ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

ALBERTA RULES OF COURT PROJECT

Self-Represented Litigants

Consultation Memorandum No. 12.18
March 2005

Deadline for Comments: April 22, 2005

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ALBERTA RULES OF COURT PROJECT

The Alberta Rules of Court Project is a 3-year project which has undertaken a major review of the *Alberta Rules of Court* [The Rules] with a view to producing recommendations for a new set of rules by 2004. The Project is funded by the Alberta Law Reform Institute (ALRI), the Alberta Department of Justice, the Law Society of Alberta and the Alberta Law Foundation, and is managed by ALRI.

This Consultation Memorandum is issued as part of the Project. It has been prepared with the assistance of the members of the Rules Project Steering Committee, who were generous in the donation of their time and expert knowledge to this project. The members of the committee are:

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A reader who wishes to have more information about the Alberta Rules of Court Project may consult the background material included in each of the Consultation Memoranda 12.1 to 12.9. More complete information, including reports about the Project and particulars of previous Consultation Memoranda, may also be found at, and downloaded from, the ALRI website:

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THE RULES PROJECT CONSULTATION MEMORANDA

No.	Title	Date of Issue	Date for Comments
12.1	Commencement of Proceedings in Queen's Bench	October 2002	January 31, 2003
12.2	Document Discovery and Examination for Discovery	October 2002	January 31, 2003
12.3	Expert Evidence and "Independent" Medical Examinations	February 2003	May 16, 2003
12.4	Parties	February 2003	June 2, 2003
12.5	Management of Litigation	March 2003	June 30, 2003
12.6	Promoting Early Resolution of Disputes by Settlement	July 2003	November 14, 2003
12.7	Discovery and Evidence Issues: Commission Evidence, Admissions, Pierrringer Agreements and Innovative Procedures	July 2003	November 14, 2003
12.8	Pleadings	October 2003	January 31, 2004
12.9	Joining Claims and Parties, Including Third Party Claims, Counterclaims and Representative Actions	February 2004	April 30, 2004
12.10	Motions and Orders	July 2004	September 30, 2004
12.11	Enforcement of Judgments and Orders	August 2004	October 31, 2004
12.12	Summary Disposition of Actions	August 2004	October 31, 2004
12.13	Judicial Review	August 2004	October 31, 2004
12.14	Miscellaneous Issues	October 2004	November 30, 2004
12.15	Non-Disclosure Order Application Procedures in Criminal Cases	November 2004	January 15, 2005

No.	Title	Date of Issue	Date for Comments
12.16	Trial and Evidence Rules – Parts 25 and 26	November 2004	January 15, 2005
12.17	Costs and Sanctions	February 2005	March 25, 2005
12.18	Self-Represented Litigants	March 2005	April 22, 2005

Available to view or download at the ALRI website: *http://www.law.ualberta.ca/alri/*

ALBERTA LAW REFORM INSTITUTE

The Alberta Law Reform Institute was established on January 1, 1968, by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding of the Institute's operations is provided by the Government of Alberta, the University of Alberta, and the Alberta Law Foundation.

The members of the Institute's Board are The Hon. Mr. Justice N.C. Wittmann (Chairman); A. de Villars, Q.C.; A.D. Fielding, Q.C.; The Hon. Judge N.A. Flatters; P.M. Hartman, Q.C.; W.H. Hurlburt, Q.C.; H.J.L. Irwin, Q.C.; P.J.M. Lown, Q.C. (Director); A.D. Macleod, Q.C.; The Hon. Madam Justice B.L. Rawlins; W.N. Renke; D.R. Stollery, Q.C. and K.D. Yamauchi.

The Institute's legal staff consists of P.J.M. Lown, Q.C. (Director); D.W. Hathaway; S. Pearson; S. Petersson and M.A. Shone, Q.C. C.R.B. Dunlop; W.H. Hurlburt, Q.C.; H.J.L. Irwin, Q.C. and W.N. Renke are consultants to the Institute.

PREFACE AND INVITATION TO COMMENT

Comments on the issues raised in this Memorandum should reach the Institute by April 22, 2005.

This consultation memorandum addresses issues relating to self-represented litigants.

Having considered case law, comments from the Bar and the Bench, and comparisons with the rules of other jurisdictions, the Steering Committee has identified a number of issues arising from these procedures and has made preliminary proposals. These proposals are not final recommendations, but proposals which are being put to the legal community for further comment. These proposals will be reviewed once comments on the issues raised in the consultation memorandum are received, and may be revised accordingly. While this consultation memorandum attempts to include a comprehensive list of issues in the areas covered, there may be other issues which have not been, but should be, addressed. Please feel free to provide comments regarding other issues which should be addressed.

We encourage your comments on the issues and the proposals contained herein. You may respond to one, a few or many of the issues addressed. You can reach us with your comments or with questions about this consultation memorandum or the Rules Project on our website, by fax, mail or e-mail to:

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LIST OF ISSUES

ISSUE No. 1
Should the Rules be altered with respect to any of the following:
(a) right of self-representation;
(b) the restrictions on representation by mentally disabled persons, minors, corporations, or persons acting in a representative capacity;
(c) right of audience before the court to
(i) non-lawyer agents, or
(ii) McKenzie friends;
(d) assistance with preparation for court;
(e) changes to or from self-representation. 29

ISSUE No. 2
To what extent should self-represented litigants be obligated to comply with the rules? 55

ISSUE No. 3
How may self-represented litigants benefit from rules changes that apply to all litigants? 57

ISSUE No. 4
What changes, if any, should be made to rules that are difficult to apply to self-represented litigants?
(a) solicitor's undertakings;
(b) preparing orders;
(c) access to confidential information;
(d) proof of service. 60

ISSUE No. 5
What changes, if any, should be made to the rules in order to accommodate self-represented litigants?
(a) role of judges;
(b) role of lawyers;
(c) use of case management;
(d) settlements;
(e) consent orders;
(f) award of costs;
(g) waiver of fees. 63

ISSUE No. 6

Should self-represented litigants be required to comply with any special procedures:

(a) mandatory attendance at court information sessions;

(b) participation in an ADR process;

(c) a self-represented litigant track using summary trial process;

(d) special procedures in types of litigation that attract high numbers of self-represented litigants. 75

EXECUTIVE SUMMARY

INTRODUCTION

This Consultation Memorandum raises questions about the operation of The Rules in cases involving self-represented litigants, and invites comment on the positions tentatively taken. Because self-represented litigants fall within the category of matters that relate to revision of The Rules as a whole, it is the work of the Steering Committee rather than a Committee specially designated to consider issues relating to a particular subject matter.

Our civil justice system is built upon the professional roles of judges and lawyers. Most litigants appearing in the Court of Queen's Bench and Court of Appeal have legal representation. Nevertheless, the law recognizes the right of a person to represent themself in court, and the incidence of self-representation is growing.

The Steering Committee recognizes that The Rules constitute a very small piece of the response required to adequately address the issues surrounding self-represented litigants. A full response would require the collaboration of all stakeholders in the civil justice system.

BASIC POSITION

The Committee's basic position is that the same procedural requirements should apply to all persons who turn to the civil justice system for the resolution of legal issues. Self-represented litigants must understand that they are responsible to perform the tasks and carry out the functions ordinarily required of professionally-trained lawyers.

Self-represented litigants will benefit from some of the rules changes stemming from our Project objectives that apply to all litigants. These include simplifying legal procedures, making The Rules easier for everyone to understand and maximizing the effectiveness of their use. As well, some protection is provided to all litigants by the overarching duty of judges to ensure procedural fairness in all proceedings.

AUDIENCE BEFORE THE COURT

The Committee proposes very few changes to Part 1.1.

Rule 5.2

No change is proposed to the basic policy of representation by a solicitor.

Rule 5.3

The Committee accepts the right of self-representation as a given for most individuals. However, corporations and persons acting on behalf of a person under legal disability or serving in a representative capacity generally cannot self-represent. The rules should clarify that the court has discretion to allow them to do so in appropriate circumstances.

Rule 5.4

The Committee does not propose any change to Rule 5.3 insofar as it recognizes the jurisdiction of the court to permit a non-lawyer agent to appear in court in extraordinary circumstances. At present, a motion for permission to appear may be made *ex parte*. The Committee proposes that the motion be brought on notice to all parties and, where possible, in writing.

The rule should be refined to recognize the jurisdiction of the court to allow assistance in court that falls short of representation. A person who helps a litigant in this way is known as a "McKenzie friend." The litigant is still self-representing. The assistance may consist of quiet suggestion, note-taking, moral support and the like.

The Committee recognizes that self-represented litigants may need help outside the courtroom as well as in court. Generally speaking, the Committee does not consider a project on rules reform to be the appropriate vehicle for reform in this area. However, it notes that a number of forms will be developed as part of the Rules Project, and this should ease the difficulty for self-represented litigants in some litigation.

CHANGES TO THE RULES GENERALLY

We have stated the Committee's basic position that the same procedural requirements should apply to all litigants. The Committee thinks it would be useful to set this position out in a rule. Federal Court Rule 122 could serve as a model, but should except situations where the rules otherwise provide.

The Committee observed that some procedures are difficult to apply to self-represented litigants. It considered whether changes should be made with respect to solicitor's undertakings, the preparation of orders, or access to confidential information. It concluded that the difficulties can be adequately handled by rules that apply to all litigants.

The Committee considered the possibility of modifying certain rules to better accommodate self-represented litigants. Here, again, it concluded that universally applicable changes to the rules will usually be adequate, although exceptions may be justifiable in some instances.

The Committee considered whether self-represented litigants should be subject to any special procedures such as mandatory attendance at court information sessions, participation in an alternative dispute resolution process, or placement on a special litigation track. It concluded that it is preferable to rely on the procedures that apply to litigation generally.

To sum up, in the Steering Committee's view, with rare exception, self-represented litigants should not be subject to requirements that are different from or additional to those imposed on litigants who are represented by counsel, excused from meeting the procedural requirements that are imposed on litigants represented by counsel, or placed in a separate litigation stream.

CHAPTER 1. SELF-REPRESENTED LITIGANTS: AN INTRODUCTION

A. Foundations of Consultation Memorandum

1. Right of self-representation

[1] English law has long recognized the right of a person to represent themself in court. The right springs from the principle of access to justice. Nevertheless, the widely observed growth in numbers of self-represented litigants in the courts is creating challenges for the civil justice system. In our view, the observation that growing numbers of persons are representing themselves in the Court of Queen's Bench and Court of Appeal of Alberta calls for response.

2. Purpose

[2] Our purpose in publishing this Consultation Memorandum is to raise questions about the operation of The Rules in cases involving self-represented litigants, to propose changes that we see to be appropriate and to seek comment on these proposed changes. The positions taken in this Consultation Memorandum are those of the Steering Committee rather than a Committee specially designated to consider issues relating to self-represented litigants. That is because self-represented litigants fall within the category of matters that relate to revision of The Rules as a whole, for which the Steering Committee has overall charge, whereas the sub-Committees were created to handle specific topics within The Rules. As with the Consultation Memoranda put out by the sub-Committees, the positions expressed in this Consultation Memorandum are tentative. The Steering Committee will reconsider these positions in light of the comments received on consultation.

3. Restrictions on scope

[3] Needless to say, modification of The Rules constitutes only a small piece in the larger panorama of the civil justice system. The potential responses to self-represented litigants are wide-ranging and multi-faceted. The growth in numbers will be best met by the collaboration of all players in the civil justice system. Only in this way can the civil justice system respond appropriately to the interests of individual litigants,

stakeholders in the system (government, judges, court staff, legal profession) and members of the public.[1]

[4] In examining the increased presence of self-represented litigants in the courts, it is well to remember that court action is taken in only a small percentage of problems for which a legal remedy exists. Genn and Paterson conducted studies in Britain and Scotland to discover how people deal with their disputes.[2] Genn found that "[a]bout eight in ten justiciable problems are dealt with either successfully or unsuccessfully apparently without any legal proceedings being commenced, without an ombudsman being contacted or any other ADR processes being used."[3] According to these studies, there is "little evidence ... of any 'rush' to law."[4] To the contrary, "involvement in legal proceedings is a rare exception."[5] Instead, what people typically want in relation to a dispute is to solve the problem, or obtain compensation for harm or loss; they typically do not want revenge, punishment or apologies.[6]

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[1] Successful civil justice system reform is unlikely to be achieved single handedly. Various participants in the delivery of the civil justice system and the public for whose benefit the system exists must work together. The value of collaboration is being amply demonstrated by the 5-year research project on the *Civil Justice System and the Public* being conducted by the Canadian Forum on Civil Justice with funding by the Alberta Law Foundation and the Social Science and Humanities Council of Canada has demonstrated the value of collaboration. As Lowe reports, *infra* note 31 at note 1, this study is being conducted "in collaboration with numerous justice community partners including the Canadian Bar Association." The study is "looking at ways of improving communication within the civil justice system and between the civil justice system and the public." In the course of conducting this study, members of the research team "have spoken with hundreds of individuals who work throughout the civil justice system, as well as with parties and witnesses" and "[a]lthough the focus of this study is on communication, [the researchers] often hear about and from unrepresented litigants."

[2] Hazel Genn, *Paths to Justice: What People Do and Think About Going to Law* (Oxford: Hart Publishing, 1999) [Genn]. *See also*: Hazel Genn & Alan Paterson, *Paths to Justice, Scotland* (Oxford: Hart Publishing, 2001) [Genn & Paterson]. These studies differ from other studies of civil justice system users in that they are population- rather than litigant-based.

[3] Genn, *ibid.* at 252.

[4] *Ibid.* at 254.

[5] *Ibid.*

[6] *Ibid.*

4. Essentially a professional system

[5] As we emphasize later in this chapter, the civil justice system is essentially a professional system.[7] Like other courts that exercise comprehensive jurisdiction, the Court of Queen's Bench and Court of Appeal of Alberta are designed around professional people who are able to work efficiently in statutory and rule-based environments. For this reason, the most effective response to the growing numbers of self-represented litigants may be to improve the availability of legal representation to persons who cannot afford a lawyer or who, for some other reason, are unable to obtain professional legal representation. This response is discussed in chapter 2 as an option to helping self-represented litigants to better represent themselves.[8]

5. Starting proposition

[6] In considering rules reform, we begin from the proposition that the same procedural requirements should apply to all persons who turn to the civil justice system for the resolution of legal issues.[9] Self-represented litigants must understand that they are responsible to perform the tasks and carry out the functions ordinarily required of professionally-trained lawyers. The positions we take in chapter 3[10] make clear our view that self-represented litigants should not be:

- placed in a separate litigation stream;
- subject to requirements that are different from or additional to those imposed on litigants who are represented by counsel; or
- excused from meeting the procedural requirements that are imposed on litigants represented by counsel.

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[7] See below at 15.

[8] See below, chapter 2, heading E.2 at 45 and following.

[9] As the Court of Appeal of Alberta stated in the case of *P.E.K. v. B.W.K.* (2003), 348 A.R. 77 at para. 7:

> ... there are not two sets of procedures, that is, one for lawyers and one for self-represented parties. In the absence of special provisions, our courts will apply the same legal principles, rules of evidence and standards of procedure regardless of whether litigants are represented by counsel or are self-represented.

[10] See below, chapter 3, heading B at 55 and following, discussing the obligation of self-represented litigants to comply with the rules.

[7] This does not mean that self-represented litigants who, for the most part, lack the skills and abilities usually associated with legal professionals will be left entirely to depend on the vagaries of their own resources. As stated in chapter 3,[11] through our Project objectives, we are committed to simplifying legal procedures, making the rules easier for everyone to understand and maximizing the effectiveness of their use. Self-represented litigants will be the beneficiaries of rules reforms that are designed to minimize procedural confusion for all players in the civil justice system, professional and lay alike (*e.g.*, litigants, counsel, court administrators, judges, educators, the public).

[8] We also recognize that judges have a duty to ensure procedural fairness. As discussed in chapter 3,[12] in exercising discretion over the conduct of proceedings and carrying out this duty, the court must: determine whether the litigant wants, needs or is entitled to a lawyer; grant appropriate adjournments to allow the litigant to obtain a lawyer or prepare for court; and, where the litigant proceeds to a hearing unrepresented, grant the litigant some degree of latitude in the conduct of the case and offer procedural explanations and assistance where necessary to ensure a fair hearing.

B. Organization of Consultation Memorandum

[9] Having laid out this foundation, we now proceed with a fuller examination of issues relating to self-represented litigants in the civil justice system. In chapter 1 of this Consultation Memorandum, we give a brief account of the available empirical information about self-represented litigants, the reasons postulated for the apparent growth in their numbers, the impact of self-represented litigants on the civil justice system, and the responses of players in the civil justice system to the increasing presence of self-represented litigants. In chapter 2, we examine representation, including self-representation, under Part 1.1 of The Rules on audience before the court. In chapter 3, we explore various options regarding the application of the general rules to self-represented litigants.

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[11] See below, chapter 3, heading C at 57 and following.

[12] See below at 6, 63 and following.

C. Terminology

1. Self-represented litigant

[10] We use the expression "self-represented litigant" to describe a person who participates in litigation, either as plaintiff or defendant, without a lawyer to represent them. Other jurisdictions use other expressions. England and Australia refer to a "litigant in person" or "LIP".[13] In the United States, the usual expression is "*pro se* litigant." Other refinements are possible, for example "URL" for "unrepresented litigant."[14]

2. Civil justice system

[11] The meaning of the phrase "civil justice system" can be broad or narrow. That is because, in Canada as well as elsewhere, "what is commonly referred to as *the* civil justice system is actually a complex set of systems made up of many separate and independently governed components."[15] This Consultation Memorandum and the Rules Project in general centre attention on the narrower objective of achieving justice in civil matters through action in the Court of Queen's Bench and Court of Appeal of Alberta.[16] Our usage does not encompass civil justice dispensed by the Provincial

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[13] See *e.g.*, United Kingdom, *Civil Procedure Rules* and *Practice Directions*, introduced in April 1999, online: <http://www.dca.gov.uk/civil/procrules_fin/index.htm> [United Kingdom]; United Kingdom, Department for Constitutional Affairs, *Further Findings, A Continuing Evaluation of the Civil Justice Reforms* (London: Department for Constitutional Affairs, 2002), Executive Summary and paras. 8.1, 8.3, 12.2, 12.8 and 13.2, online: <http://www.dca.gov.uk/civil/reform/ffreform.htm#part8>; Australian Institute of Judicial Administration, *Litigants in Person Management Plans: Issues for Courts and Tribunals* (Melbourne, Vic.: Australian Institute of Judicial Administration, 2001), online: <http://www.aija.org.au/online/LIPREP1.pdf> [AIJA-LIP].

[14] See *e.g.*, D.A. Rollie Thompson & Lynn Reierson, "A Practising Lawyer's Field Guide to the Self-Represented" (2002) 19:3 Can. Fam. L.Q. 529 [Thompson & Reierson]. Thompson and Reierson reserve the label "self-represented" for persons who choose to litigate on their own, even though they can afford counsel. Other litigants are unrepresented (*ibid.* at 532-533).

[15] Diana Lowe & Mary Stratton, "Talking With the Public: The Public, Communication and the Civil Justice System" (Paper presented to the Canadian Institute for the Administration of Justice Conference in Hull, Quebec, October 2002) which takes "a first look at results from Lowe and Stratton which explain that the term "the public" is also far-reaching in meaning, at note 2:

> Similarly, *the public* is not one homogeneous group of citizens, but comprised of many individuals and groups with different social characteristics and needs. The *Civil Justice System* and the *Public* research design is sensitive to these conditions.

[16] Our project is focussed on the civil justice system. However, our Criminal Rules Committee is

(continued...)

Court of Alberta or a multitude of administrative tribunals, or dispute resolution undertaken in the private sector. A broad definition of "civil justice" would embrace these components as well.

D. Explanations for the Growth in Self-representation

[12] A range of explanations may account for the increased presence of self-represented litigants in Alberta's superior courts. Foremost among these explanations is an increase in the number of persons who are unable to afford a lawyer because of rising court and lawyer fees, the costs of prolonged litigation, cutbacks in funding for legal aid and tightened restrictions on eligibility.[17] The inability to pay includes individuals living above and below the poverty line. Genn's population-based research bears out the fact that legal problems have a tendency to appear in clusters[18] – for example, divorce and children problems, employment and money problems[19] – which may add to the cost of achieving legal resolution and the reasons why a person becomes a self-represented litigant.

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[16] (...continued)
reviewing the operation of the rules pertaining to criminal matters.

[17] Devlin ties the reasons for the growing number of self-represented litigants appearing in our courts to the political, economic, social and cultural dimensions of what he calls the "new economy" – an economy which is "reconfiguring wealth, knowledge and power in modern society": Richard Devlin, "Breach of Contract?: The New Economy, Access to Justice and the Ethical Responsibilities of the Legal Profession" (2002) 25 Dalhousie L.J. 335 at 339 [Devlin]. Devlin's account of the international economic forces at work in the new economy and the political consequences for national governments is well worth reading. He characterizes the emerging form of government in Canada as a "social investment state" which emphasizes the pursuit of competitiveness, employability and prosperity. He notes a significant alteration in the social fabric of Canadian society, which ties in closely with governments' commitment to deficit reduction. A substantial diminishment of government support for access to justice comprises part of the retreat from the provision of a social safety net. He also remarks on the intersection of cultural diversity with economic inequality and poverty. From a cultural perspective, the new economy can be shown to disproportionately harm members of socially and economically disadvantaged minorities such as women, aboriginals and immigrants. Lawyers have played an integral part in the process of transformation to the new economy and hold an essential place as gate keepers of access to justice and the justice system. In this economy, governments focus on debt-reduction, privatization and downloading of costs on system users (*ibid.* at 338).

[18] Genn, *supra* note 2 at 30:

> In effect this means that individuals were more likely to experience problems of these types in clusters i.e. if they experienced the problem *at all* they were likely to experience it on more than one occasion.

[19] Genn, *ibid.* at 34.

[13] In some cases, a litigant may be unable to find a lawyer who is willing to act, for example, due to a perception that the person's case lacks merit.[20] Or, lawyers may turn a person down because of communication difficulties, due perhaps to unusual conduct or mental illness or problems with expression in English.[21] A person's poverty may exacerbate the attempt to find a lawyer willing to act on a *pro bono* basis:[22]

> As the American legal system is a for-profit system, lawyers do not take claims from the poor because they often have intractable ongoing legal and human problems that are often not solvable solely through the legal system because they do not provide a good profit margin.

The litigant may have consulted a lawyer with respect to certain steps in the litigation or have been represented by a lawyer but have withdrawn instructions, or the lawyer may have ceased to act shortly before a trial or hearing.[23] In situations like those described in this paragraph, a person may have to represent themself even when they have a good claim.

[14] Some self-represented litigants may be able to afford a lawyer, but choose to represent themselves. To Thompson and Reierson, these are true self-represented litigants.[24] A true self-represented litigant does not want counsel. The person may be reluctant to spend money on a lawyer, or harbour an attitude of antipathy to lawyers, thinking they can do the job as well or better themself (labelled by some as a "recreational litigant"),[25] or be looking for a soapbox on which to air their grievances. Occasionally, a self-represented litigant will be an habitual litigant, or "deluded or

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[20] AIJA-LIP, *supra* note 13 at 3.

[21] *Ibid.*

[22] Deborah Cantrell, "Justice for Interests of the Poor: the Problem of Navigating the System without Counsel" (2002) 70 Fordham L. Rev. 1573, summarized in Maria Barrett-Morris, Mike Aujla & The Honourable Judge Hugh F. Landerkin, *The Self Represented Litigant in the Courts: An Annotated Bibliography*, online: <http://www.royalroads.ca/resources/srl+bibliography+f2.doc>; and Australian Institute of Judicial Administration, *Self-Represented Litigants Bibliography 1998-2004* (Melbourne, Vic.: Australian Institute of Judicial Administration, n.d.), online: <www.aija.org.au/LIP.htm> [AIJA-LIP Bibliography].

[23] AIJA-LIP, *supra* note 13 at 3.

[24] Thompson & Reierson, *supra* note 14 at 530, 532-33.

[25] Marguerite Trussler, "A Judicial View on Self-Represented Litigants" (2002) 19 Can. Fam. L.Q. 547 [Trussler].

dangerous."[26] Some observers comment on the emergence of a "do-it-yourself" era which is being strengthened by programs to improve public legal education, the availability of self-help publications, the expansion of para-legal services and the delivery of programs by community agencies.

[15] Finally, some jurisdictions may "discourage or prevent persons from using legal representation"[27] as was the case in the early days of small claims and family law jurisdiction in Alberta's Provincial Court.

E. Available Data on Self-representation

[16] Reliable information is needed to assist collaborative planning by all players in the civil justice system to address the challenges brought about by the increased presence of self-represented litigants and other issues. In this section, we briefly describe what is known about self-represented litigants and their impact on the operation of our courts.

[17] Much of our current information about self-represented litigants comes from the anecdotal observations of persons involved in the civil justice system. Useful bibliographies of current literature on self-represented litigants are also being compiled.[28]

[18] However, the civil justice system lacks a developed body of empirical research. The empirical research that does exist can be divided into two categories. Research in the first category focuses on the numbers of self-represented litigants, their characteristics (including the circumstances giving rise to the lack of representation)

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[26] *Ibid.* at 549. According to a 1999 Report to the Family Court of Australia, a significant group of self-represented litigants are "dysfunctional serial litigants": John Dewar, Barry Smith & Cate Banks, *Litigants in Person in the Family Court of Australia*, A Report to the Family Court of Australia (Research Paper No. 20) (Canberra: Family Court of Australia, 2000).

[27] AIJA-LIP, *supra* note 13 at 3.

[28] See, *e.g.*: Barrett-Morris, Aujla & Landerkin , *supra* note 22. The Canadian Forum on Civil Justice is currently preparing a bibliography of self-represented litigant materials as part of its project for the Canadian Judicial Council, see *infra* note 31. More specialized bibliographies are also coming into existence: see, *e.g.*, AIJA-LIP Bibliography, *supra* note 22; Paul D. Healey, "Pro Se Users, Reference Liability, and the Unauthorized Practice of Law: Twenty-Five Selected Readings" (2002) 94 Law Libr. J. 133.

and their needs. Research in the second category focuses on the effect of the growth in the number of self-represented litigants on the civil justice system.

1. Information about self-represented litigants

a. Increased presence in our courts

[19] In this Consultation Memorandum, we proceed from the assumption that the numbers of self-represented litigants in our courts is on the rise. The increased presence of self-represented litigants in the courts has been observed anecdotally in Alberta, in both the Court of Queen's Bench and the Court of Appeal.

[20] To date, no provincial or national study has published results giving reliable empirical data on the number of self-represented litigants in Canadian courts.[29] However, research initiatives are afoot. The Canadian Judicial Council has commissioned the Canadian Forum on Civil Justice (CFCJ) and Robert Hann and Associates to jointly undertake a study to "assess the nature and extent of challenges presented to trial and appeal courts across Canada by self-represented litigants and the unrepresented accused."[30] The products will include "a set of practical resources for Canadian judges and, with their input, court administrators." This study is scheduled for completion in March 2005. It is not yet known how the results of this study will be shared. The Canadian Centre for Justice Statistics (CCJS), a division of Statistics Canada, "has undertaken a Civil Court Study which has involved the development of national requirements for the collection of statistical information in our civil courts."[31] Because the Centre is just beginning to put these into place, it will be a few years before we begin to see data flowing from this study.

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[29] The only comprehensive *national* study on unrepresented litigants in Canada to date is a study of unrepresented adult accused in nine provincial criminal courts conducted by the Research and Statistics Division of Justice Canada: see Hann *et al.*, *infra* note 84. See also: Ab Currie, "A Burden on the Court? Self-Representing Accused in Canadian Criminal Courts" *JustResearch* 11 (2004) 5, online: <http://canada.justice.gc.ca/en/ps/rs/rep/jrll/jr11.pdf>.

[30] Canadian Forum on Civil Justice, "Canadian Judicial Council Project on Self-represented Litigants and Unrepresented Accused", online: <http://www.cfcj-fcjc.org/research.htm> [CFCJ CJC Project].

[31] Diana Lowe, "Unrepresented Litigants: What Are We Doing to Meet the Challenge?" (Paper presented to the Canadian Bar Association Continuing Legal Education Session on Winning Advocacy Skills: "Facing an Unrepresented Litigant", Winnipeg, August 2004) [unpublished] [Lowe].

[21] Both formal and informal studies and data collections have been undertaken in various courts, with limited results. Prince Edward Island's *Task Force on Access to Justice* could not determine the number of self-represented litigants appearing in its courts:[32]

> It is difficult to say just how many litigants are, in fact, representing themselves but there is a clear sense from those within the court system that the number of these litigants is growing each year.

That study found that self-represented litigants have increased over 19% in a one-year period in family/divorce cases. In the Superior Court, 10.1% of all cases before the courts involve at least one self-represented litigant. Of this total, 83.4% have appeared in proceedings involving divorce/family matters (data collected between 1999-2001).[33]

[22] The British Columbia Justice Review Task Force, reported that a "snapshot" of two week periods in 1999-2001 showed that the number of self-represented litigants in the Supreme Court varies from 5.5% to 14.2%.[34] In family matters the numbers were higher, ranging between 11.5% and 24.6% for the same periods. With no empirical data to compare, the numbers could not be used to show an increase in the number of self-represented litigants in the courts, although there is a "perception of those within the system that there are increasing numbers of self-represented litigants."[35]

[23] In a 'mini-study' conducted in daily family law chambers in the Court of Queen's Bench in Edmonton between January-March 2001, an average of 54 applications per month were filed by self-represented litigants.[36] Of these, an average of 21 were heard, the rest being struck from the list or adjourned. These numbers do not include applications where the respondent was self-represented. Of the applications filed by self-represented litigants: 34% were for a new application or a

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[32] Task Force on Access to Justice, *Final Report* (Charlottetown: Office of the Attorney General, July 2002) at 3.

[33] *Ibid.* at 13.

[34] British Columbia Justice Review Task Force, *Exploring Fundamental Change: A Compendium of Potential Justice System Reforms* (July 2002), online: <http://www.bcjusticereview.org>.

[35] *Ibid.* at 23.

[36] These statistics are reported in Trussler, *supra* note 25 at 548-49.

variation of a child or spousal support order, 29% were for an initial application for, or review of, a restraining order; 24% were to compel financial disclosure; and 5% were custody or access applications.

[24] An oft-cited statistic regarding the increased presence of self-represented litigants in Canadian courtrooms comes from data compiled by the Ontario Superior Court.[37] It reports that between 1995 and 1999 the number of self-represented litigants in Ontario's Unified Family Court rose by an alarming 500%.[38] Between these dates, 1073 files were opened by individuals representing themselves. Of these files, 633 were civil cases, 415 were family cases, and 25 were criminal in nature. These statistics are modest; they only reflect files *opened* between these dates, *by* a self-represented litigant. They do not include files opened previously or by a represented applicant where the respondent is unrepresented. Those numbers are much larger. For example, in the Ontario Superior Court in 1998, 16,194 cases included a self-represented litigant as a party, an increase of approximately 1/3 from 1994.[39] As of 1999, self-represented litigants outnumbered represented litigants in that Court 1.6 to 1.[40]

[25] Increases in the numbers of self-represented litigants are also reported in common law jurisdictions outside of Canada. For example, in the United States, data from the Administrative Office of the U.S. Courts show that between 1991 and 1993 the number of *pro se* litigants in the Court of Appeals (Federal Circuit) increased by

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[37] The statistics in this paragraph were collected by the Ontario Superior Court in the fiscal year 2000/2001 ending March 31, 2001, and are reported in Lynn Hartwell, "A Profile of the Self-Represented Litigant: Highlights of Some of the Relevant Research" (Paper presented to the ACCA Symposium in Winnipeg, April 19 2001 [unpublished] [Hartwell]; and the speaking notes for Associate Chief Justice Oliphant, "Self-represented Litigants: Views from the Bench" (Paper presented to the ACCA Symposium, Winnipeg, April 20, 2001).

[38] Reference to the 500% increase is cited in Lynne Cohen, "Unrepresentative Justice" *Canadian Lawyer* 25:8 (August 2001) 40; Middlemiss, *infra* note 82; and Canadian Bar Association, *The Future of the Legal Profession: The Challenge of Change: A Report of the Young Lawyers' Conference* (Ottawa: Canadian Bar Association, 2000) at 72, online: <http://www.cba.org/CBA/News/pdf/future.pdf> [CBA, *Future of the Legal Profession*].

[39] Hartwell, *supra* note 37.

[40] *Ibid.*

49%.[41] Two more recent American surveys found that the rate of self-represented litigants in family matters is normally around 60% but in some cases is as high as 80%.[42]

b. Key characteristics

[26] In dealing with self-represented litigants, it is important to understand who the self-represented litigant is. As is true regarding the numbers of self-represented litigants, there is a call for more research into the characteristics of self-represented litigants, the reasons why they are in court without representation, and their self-representation needs.

[27] At the national level, the Canadian Forum on Civil Justice has undertaken a 5-year study of the *Civil Justice System and the Public*.[43] In this study, the researchers have found that:[44]

> Those who work within the justice community tend to perceive unrepresented litigants as either individuals with low income and low literacy, or as individuals who choose to self-represent because they have a mission against the system.

While many self-represented litigants fall into the stereotypical categories, a significant portion are knowledgeable, willing to undertake research and choose to represent themselves:[45]

> We have learned that people are unrepresented for numerous reasons. An individual who is educated and choosing to self-represent is in a significantly different position than one who is illiterate, ineligible for legal aid, and forced to appear without counsel.

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[41] Jona Goldschmidt, "How Are Courts Handling *Pro Se* Litigants?" (1998) 82:1 Judicature 13.

[42] Justice John Faulks & Judicial Registrar Jonathon Ramsden, "National Conference on *Pro Se* Litigation", online: Family Court of Australia <http://www.familycourt.gov.au/presence/resources/file/eb0009059db357c/faulks4.pdf> [Faulks]; summarized in Barrett-Morris, Aujla & Landerkin, *supra* note 22.

[43] See *supra* note 15. More information about this research and the early findings is available in the Canadian Forum on Civil Justice's newsletter, *News & Views on Civil Justice Reform* 7 (Summer 2004), a Special Issue focussed entirely on this research project. Detailed information is also available online: <www.cfcj-fcjc-org>.

[44] Lowe, *supra* note 31 at 2.

[45] *Ibid.*

[28] Information about the characteristics of self-represented litigants varies widely from jurisdiction to jurisdiction and study to study. For example, regarding reasons for self-representation, variations are apparent from two recent American studies. In Florida, the high incidence of self-represented litigants was largely attributed to the individual's inability to pay lawyers fees, while in Maricopa County it was more likely individuals electing to exercise their constitutional right to represent themselves.[46] Regarding income levels, research conducted in 1990 by the American Bar Association (ABA) ascertained that "it is primarily younger, lower-income people without children and little, if any, real estate or property, who represent themselves."[47] In contrast, research commissioned in 1996 by the New York State Bar showed that the number of middle-income people opting for self-representation is on the rise.[48] Regarding education level, the 1990 ABA research suggested that most self-represented litigants "have completed some college work."[49] A quarter of the respondents in the 1996 New York State Bar research were self-represented and these litigants were "better educated and on the more highly compensated end of the middle income spectrum."[50] Evidence in Australia points in the opposite direction. According to a 1999 Report to the Family Court of Australia, self-represented litigants are often "[p]ersons, who are more likely than the population as a whole to have limited formal education, limited income and assets and to have no paid employment."[51]

c. *Need for information, assistance and advice*

[29] In the opening paragraph of this Consultation Memorandum, we stated that the right of self-representation springs from the principle of access to justice. Obstacles to access to justice can include "economic barriers, complexity, intimidation, lack of knowledge, language and understanding, distrust, commitments, inconsistent

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[46] Faulks, *supra* note 42.

[47] Ann M. Zimmerman, "Going *Pro Se*" (2000) 73 Wis. Lawyer 10, summarized in Barrett-Morris, Aujla & Landerkin, *supra* note 22.

[48] *Ibid.*

[49] *Ibid.*

[50] *Ibid.*

[51] Dewar, Smith & Banks, *supra* note 26.

information, costs of reform, location, and lack of uniformity."[52] Additional obstacles are the "lack of equality between the powerful, wealthy litigant and the under-resourced litigant," fragmented organization and excessive adversarialism.[53]

[30] Not surprisingly, evidence (both anecdotal and empirical) suggests that in the adversarial system self-represented litigants do not fare as well as litigants who are represented by lawyers.[54] Many studies indicate that what self-represented litigants need most is information, assistance and advice. In its 1996 report, the Canadian Bar Association Task Force on *Systems of Civil Justice* hypothesized that often the biggest hurdle facing litigants is "complexity in the language and substance of court forms and procedures."[55] The researchers in the CFCJ's 5-year study of the *Civil Justice System and the Public* repeatedly heard that the public are looking for information about the process of litigation, how they should conduct themselves in court, and caselaw. In England, Genn identified "a clear need for knowledge and advice about obligations, rights, remedies and procedures for resolving justiciable problems for all types of people and all types of problems."[56] The Australian Institute of Judicial Administration (AIJA) has observed that self-represented litigants "have unique needs stemming from a lack of knowledge of both the substantive and the procedural elements of law."[57] In addition to this lack of knowledge, a self-represented litigant's "lack of objectivity and emotional involvement in the case also often create barriers to

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[52] Chicago-Kent College of Law, "Meeting the Needs of Self-Represented Litigants", online: Access to Justice <http://a2j.Kentlaw.edu/A2J_Author>, summarized in Barrett-Morris, Aujla & Landerkin, *supra* note 22.

[53] The Right Honourable H.S. Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: Lord Chancellor's Department, 1995) [Woolf Interim Report].

[54] See *e.g.*, Camille Cameron & Elsa Kelly, "Litigants in Person in Civil Proceedings: Part I" (2002) 32 Hong Kong L.J. 313, summarized in Barrett-Morris, Aujla & Landerkin, *supra* note 22.

[55] Canadian Bar Association, Task Force on Systems of Civil Justice, *Report of the Task Force on Systems of Civil Justice* (Ottawa: Canadian Bar Association, 1996) [CBA 1996 Report].

[56] Genn, *supra* note 2, summarized in Barrett-Morris, Aujla & Landerkin, *supra* note 22; see also: Genn & Paterson, *supra* note 2.

[57] AIJA-LIP, *supra* note 13, summarized in Barrett-Morris, Aujla & Landerkin, *supra* note 22.

solutions."[58] This suggests that the need for information, advice and support may extend to both emotional and practical matters.[59]

[31] A significant proportion of persons facing problems for which a legal remedy is available need assistance. Information alone will not be enough.[60] As the Canadian Bar Association Task Force pointed out in its 1996 report, self-represented litigants may "need assistance from court information offices in filling out forms."[61] The need for help is far-reaching. In addition to help filling out forms and completing documents, self-represented litigants require assistance to know the essentials of their substantive rights, the actions available to them, and the elements of the action that must be proved; the sources of help they can call on; the possibilities for resolving the dispute out of court, for example, by employing one or another ADR method; and court procedures and decorum. Moreover, in order to be meaningful, the assistance must be available at an appropriate time in the proceedings.

2. Impact on the civil justice system

[32] The unmet needs of self-represented litigants comprise only one part of the picture. A variety of recent publications comment on the challenges that growing numbers of self-represented litigants pose for the judiciary, lawyers, opposing parties and court personnel. The challenges arise in part from the fact that the civil justice system is essentially a "professional system":[62]

> Litigation in courts is a highly technical matter dependent upon the inter-related skills of persons of appropriate professional expertise, whether as judges, barristers, solicitors or court staff.

To varying degrees, courts are designed around professional people able to work efficiently in statutory and rule-based environments:[63]

> The efficient and effective operation of courts and tribunals relies on people having skills and expertise in particular roles. For instance, in

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[58] *Ibid.*

[59] Dewar, Smith & Banks , *supra* note 26.

[60] Genn, *supra* note 2 at 256.

[61] CBA 1996 Report, *supra* note 55 at 55.

[62] AIJA-LIP, *supra* note 13 at iii.

[63] *Ibid.* at 4.

> ordinary civil litigation in courts, a [lawyer] is trained to take instructions from the litigant or potential litigant ... and has the expertise to present effectively the litigant's case to the court. Trained court staff ensure that all necessary documents are filed in a proceeding and that a matter is efficiently managed to a resolution or a trial as soon as possible. The judge is responsible for making an impartial determination on the basis of the cases presented to the court.
>
> Where resources are limited, the effective presentation of a case by a qualified person should lead to a more efficient and effective court system. This preserves the capacity of the court or tribunal to provide effective and speedy dispute resolution service to all users.

Various duties accompany the professional roles.

[33] Needless to say, a civil justice system structured in this way moves less smoothly when persons who have fewer skills, less experience with the statutes and rules, and no professional duties choose to represent themselves:[64]

> Not being part of this system and bearing no duties to the court, litigants in person will inevitably create problems for courts that are not able to be easily or wholly resolved.

On the flip side, self-represented litigants "should be aware they face difficulties which may prejudice the proper presentation of their case."[65]

[34] Self-representation rates are high in family law matters. In Canada, a working group set up by the Toronto Region Family Courts Committee reported in 1997.[66] Their data showed that over 75% of the parties appearing before the Jarvis Street Court were unrepresented. The working group listed the following series of "problems" flowing from the appearance of self-represented litigants:[67]

> - The lack of guidance given to self-represented litigants in how to prepare a case

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[64] *Ibid.* at 1.

[65] *Ibid.*

[66] Toronto Region Family Courts Committee, *Report of the Working Group on Unrepresented Litigants* (March 1997) [unpublished], summarized in Barrett-Morris, Aujla & Landerkin, *supra* note 22.

[67] *Ibid.* See also Trussler, *supra* note 25 at 564-566. She identifies the following "problems created by self-represented litigants": lack of knowledge of the law; lack of knowledge of court procedure; not knowing how to behave in the courtroom; inability of many people to stand up in court and express themselves; litigants who are "on a mission"; security; cases take more time; self-represented litigants almost never settle; and all dealings with self-represented litigants must be recorded.

- The evolution of the judge's function toward the self-represented litigant, including the role of intake worker, interviewer, lawyer and social worker
- Providing judges with sufficient information with which to make an informed decision
- A decline in respect for the Court by self-represented litigants when frustrated by an inability to understand the process
- Placing Court staff in awkward situations when self-represented litigants try to elicit legal advice from them
- Increased time spent in Court by all parties
- More difficulty in trial management
- The need for greater Court security

These problems gave rise to a number of consequences for the civil justice system, including:[68]

- Case management working at an unsatisfactory level
- Settlements or orders based on insufficient evidence
- Significant cost consequences
- Reduction of the number of new cases heard over a one-year period by 40% owing to a slowing of the system caused by self-represented litigants.
- Judges have to sit for longer hours, resulting in additional cost for security and Court personnel
- Lawyers working for legal aid are spending more time waiting, thereby putting added strain on scarce legal aid resources
- Court reporters are required at all Court proceedings, thereby adding to overall costs

[35] Judges are caught between their duty to conduct a fair hearing, which may include assisting the self-represented litigant to the necessary extent, and their duty to both be and appear to be impartial in their adjudication. They must be and appear to be fair in the eyes of both represented and unrepresented parties. In addition, judges may experience increased "stress and frustration" from:[69]

- [the inability of self-represented litigants] to clearly state issues, or to produce relevant evidence
- their lack of knowledge of procedure (which leads to an increase in matters which are dismissed or adjourned)
- their inability to understand the need for such procedural requirements

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[68] *Ibid.*

[69] Dewar, Smith & Banks, *supra* note 26, summarized in Barrett-Morris, Aujla & Landerkin , *supra* note 22.

- the increase in court time, and the difficulty of "walking the line" between assisting the self-represented litigant and ensuring the other party is not unduly prejudiced.

[36] Lawyers owe duties to their clients and to the court. At times, an opposing counsel may be placed in the position of having to act to the possible disadvantage of their client, for example, by providing the court with all of the legal authorities on an issue, even where those authorities are favourable to the opposing side. The need to act on this duty is likely to arise more often where a self-represented litigant is party to the proceedings than where all litigants are represented by counsel. It is even possible that where a self-represented litigant "has failed to bring evidence on a matter essential to their case, counsel has an obligation to bring it to the attention of the court."[70] Counsel uninvolved with the case but present in court may also be obliged to speak up to assist the court where a self-represented litigant has missed an important point.[71]

[37] Represented parties may complain that:[72]

- Self-represented litigants are granted indulgences that prejudice the represented party
- Self-represented litigants bring frivolous claims that result in extra cost to the represented party
- Judicial assistance afforded to the self-represented litigant creates anxiety and resentment for the represented party
- Costs are rarely recovered against the self-represented litigant.

This may lead to "a perceived or actual sense of violation of the fundamental principle of neutral justice."[73]

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[70] AIJA-LIP, *supra* note 13, referring to the suggestion of Mildren J. in *James Laferla v. Birdon Sands Pty Ltd.*, (1998) No. LA 22 (N.T.S.C.), but cautioning to compare Louise Byrne & C.J. Leggat, "Litigants in Person - Procedural and Ethical Issues for Barristers" (1999) 19 Aust. Bar Rev. 41.

[71] Further possible obligations are canvassed by Kristen Lewicki in a term paper entitled "Between A Rock and a Hard Place: Ethical Hurdles for Lawyers Dealing with Self-Represented Litigants" [unpublished]. Ms. Lewicki, a 3rd year law student at the University of Alberta, is an ALRI research assistant.

[72] Dewar, Smith & Banks, *supra* note 26, summarized in Barrett-Morris, Aujla & Landerkin, *supra* note 22.

[73] Steven Berenson, "A Family Law Residency Program? A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court" (2001) 33 Rutgers L.J. 105 [Berenson],

(continued...)

[38] Court administrators face added responsibilities when self-represented litigants approach them for help. Moreover, they must not cross the line between providing information and giving advice – a line which is difficult to define and draw.

[39] Members of the public may lose confidence in the courts as dispensers of justice because they perceive the courts as inaccessible and unfriendly.

3. Gleanings from the available data

a. Debunking stereotypical thinking

[40] Persons who work within the civil justice system may harbour stereotypical perceptions about the characteristics of self-represented litigants which are not factually founded. Research challenges the stereotypical perceptions. As Thompson and Reierson put it, not all self-represented litigants are "archetypes."[74] For example, the general wisdom is that self-represented litigants are less likely to settle than litigants represented by counsel.[75] However, a study conducted in San Francisco found

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[73] (...continued)
summarized in Barrett-Morris, Aujla & Landerkin, *supra* note 22.

[74] Thompson and Reierson, *supra* note 14, as summarized by Barrett-Morris, Aujla & Landerkin, *supra* note 22, identify six categories of unrepresented litigant (these categories do not include persons who can afford a lawyer but choose to self-represent):

> a) Individuals who qualify for legal aid but can't obtain counsel because of cut backs and case priorities.
> b) The "working poor" who work full-time, making them ineligible for Legal Aid, yet can't afford a lawyer.
> c) "Good guy respondents" who may be able to afford counsel but make severely constrained choices not to because they may have variety of problems such as high debt or kids to support etc.
> d) "Do-it - yourselfers" who think their case is simple and they "want to do lawyerly things and be treated like a lawyer"
> e) "Disaffected and vexatious but not dangerous" self-represented litigants are the largest subgroup. They exhibit a combination of contempt and admiration for lawyers. The authors state they are "lawyer wannabes" but don't think of much of any lawyer they've ever met.
> f) "Borderline and dangerous" self-represented litigants are a risk and may pose a threat to the opposing party, counsel, and potentially the court.

[75] See *e.g.*, Trussler, *supra* note 25, who, at 565, identifies "the fact that self-represented litigants rarely settle" as one of the primary problems the self-represented litigant causes for the judiciary.

that "*pro se* defendants were disproportionately represented among settled claims."[76] In this study, settlements were most often reached in employment, discrimination, tort and labour cases.[77] Similarly, a widespread perception exists that increased time and resources are needed to process self-represented litigant cases in the courtroom, largely because of their lack of knowledge of law and legal procedure and difficulty expressing themselves in the language of law.[78] However, unfamiliarity with the legal system may result in fewer resources being expended because self-represented litigants do not know what to ask for in interim matters and trials are truncated because of lack of knowledge.[79] In some courts, representation may actually increase the length of trial.[80] According to an American writer, not only do "[h]earings and trials in domestic relations cases take *less court time* when *Pro Se* litigants are involved" but also "*Pro Se* cases are less likely to require hearings or trial than cases with lawyers, and *Pro Se* litigants proceed through the court system much faster than cases with two lawyers."[81]

b. Interpreting research data

[41] Research data should be interpreted with caution. For example, data giving the numbers of self-represented litigants may be inflated. That is because most court studies get their data from court dockets whereas counsel may have appeared at the

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[76] Spencer G. Park, "Providing Equal Access to Equal Justice: A Statistical Study of Non-Prisoner *Pro Se* Litigation in the United States District Court for the Northern District of California in San Francisco" (1997) 48 Hastings L.J. 821, summarized in Barrett-Morris, Aujla & Landerkin, *supra* note 22.

[77] *Ibid.*

[78] See *e.g.*, Berenson, *supra* note 73; Trussler, *supra* note 25 at 565.

[79] This was the experience of the Family Court as reported in the Law Reform Commission of Western Australia, *Review of Criminal and Civil Justice System in Western Australia* (Consultation Drafts, Project 92) (Perth: Law Reform Commission of Western Australia, 1999), vol. 1, Section 2:10 – Self-represented Litigants at 551 and Section 2:11 – Unreasonable and Vexatious Litigants at 585, cited in AIJA-LIP, *supra* note 13. Of course courtroom time does not tell the full story. "Matters that fail at an initial stage for technical reasons may still consume significant time from staff and judicial officers, in dealing with defective paperwork and explaining matters to the litigant in person": Dewar, Smith & Banks, *supra* note 26, cited in AIJA-LIP, supra note 13 at 4.

[80] AIJA-LIP, *supra* note 13 at 5.

[81] John Greacen, "An Administrator's Perspective: The Impact of Self-represented Litigants on Trial Courts – Testing Our Stereotypes Against Real Data" (2002) 41 Judges' Journal 32, summarized in Barrett-Morris, Aujla & Landerkin, *supra* note 22.

last minute to represent a litigant slated on the court docket as unrepresented.[82] On the other hand, as noted previously, the data may be understated because it records self-represented plaintiffs but not self-represented defendants.

c. Comparing jurisdictions and courts

[42] Significant systemic differences among jurisdictions and courts complicate meaningful comparisons of data. Examples of variations in information about the characteristics of self-represented litigants were provided above.[83] Within Canada alone, the differences can be startling. Data in a study of self-represented litigants in nine provincial criminal courts, including Edmonton, revealed a wide variation from court to court in the proportions of self-represented litigants and the stages at which they are unrepresented":[84]

> Figures ranged from 5% to 61% for a first appearance (above 36% in 4 courts), and from 1% to 32% for a third appearance (above 19% in 4 courts). In some situations (jurisdiction and stage at which a plea was entered being variables) "well in excess of 50 percent of accused are convicted without the benefit of legal representation."

F. Responses of Government, the Judiciary, the Legal Profession and Others

[43] The growing numbers of self-represented litigants in our court system has stimulated responses from government, the judiciary, the legal profession, court administrators and community agencies. Indeed, many important and creative initiatives are "being undertaken in our justice system to assist unrepresented litigants in their search for legal information, advice and representation."[85] Often, these initiatives are undertaken by one of the interested constituencies in concert with others.

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[82] Jim Middlemiss, "Who Needs a Lawyer?" *The National* 8:6 (October 1999) 12 [Middlemiss]. In some cases, the proportion of self-represented litigants may be inflated by as much as 80%.

[83] See above at 13.

[84] Robert G. Hann, *et al.*, *Court Site Study of Adult Unrepresented Accused in the Provincial Criminal Courts* (Ottawa: Department of Justice Canada, 2002) at iv <http://canada.justice.gc.ca/en/ps/rs/rep/rr03-LARS-2a.html>.

[85] Lowe, *supra* note 31. In this paper, Lowe describes a number of recent initiatives in Canada. The list is not exhaustive.

1. Government

[44] Government activity is concentrated in two areas. The first area is the sponsorship of research initiatives and pilot projects. In recent years, governments in several Canadian jurisdictions have undertaken comprehensive reviews of the operation of the civil justice system in general, usually in conjunction with the courts.[86] Earlier this year, Court Services in the Nova Scotia Department of Justice released the results of a study conducted specifically for the purpose of assessing self-represented litigant needs.[87] The second area of government activity is the development of alternative avenues of dispute resolution on either a stand-alone or court-connected basis. Mediation, a process in which the litigant's voice is heard directly, commonly plays a key role in the alternative process.[88]

2. Judiciary

[45] Like government, members of the judiciary have been active in responding to the self-represented litigant phenomenon. Previously, we referred to the study of self-represented litigants and unrepresented accused commissioned by the Canadian

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[86] See *e.g.*, Justice Reform Committee, *Access to Justice: Report of the Justice Reform Committee* (Victoria: Queen's Printer for British Columbia, 1988); Ontario Civil Justice Review, *Civil Justice Review: First Report* (Toronto: Ontario Civil Justice Review, 1995) and Ontario Civil Justice Review, *Civil Justice Review: Supplemental and Final Report* (Toronto: Ontario Civil Justice Review, 1996) [Ontario, *Civil Justice Review* 1996]; Quebec Ministère de la Justice, *Report of the Civil Procedure Review Committee: A New Judicial Culture: Summary* (Quebec: Ministère de la Justice, 2001), summary.

[87] Nova Scotia Department of Justice, *Nova Scotia Self Represented Litigant: Needs Assessment Study* (Halifax, NS: Department of Justice, 2004), online: <http://www.gov.ns.ca/just/Publications/SRL%20report%20March%202004.pdf>. The study was conducted in collaboration with the justice community working through an overall Advisory Committee and working committees on issues relating to six levels of court.

[88] Ontario introduced a Mandatory Mediation Program as a pilot project in Toronto and Ottawa on January 4, 1999 in Ontario, *Rules of Civil Procedure* [Ontario]. The program is a key component of Ontario's Civil Justice Reform strategy, which was recommended by the Ontario, *Civil Justice Review* 1996, *supra* note 86. Ontario, r. 24.1 became permanent in 2001. Mandatory mediation is now in effect in Ottawa and Windsor but has been suspended in Toronto because of difficulties with the scheduling of case management conferences: David Price, "Opening Statement: An Enormously Retrogressive Step" *The Lawyers Weekly* (December 17, 2004) 18. In Alberta, the Court of Queen's Bench of Alberta has issued Civil Practice Note No. 11 to establish a pilot project on Court-Annexed Mediation, online: <http://www.albertacourts.ab.ca/qb/practicenotes/civil/pn11CourtAnnexedMediation.pdf>. This Practice Note applies to non-family civil actions in the Judicial Districts of Edmonton and Lethbridge, filed on or after September 1st 2004. Commencing January 1, 2005, where all parties have filed and served an Affidavit of Records, it permits any party to file and serve a Request to Mediate on all other parties.

Judicial Council.[89] The material being developed by the Canadian Forum on Civil Justice, which is handling the civil side of the work, "includes an extensive, annotated bibliography on self-represented litigants; a manual for court administrators and a bench-book for judges."[90] The sub-committee "is also "considering the advisability and feasibility of adopting a statement of principles for dealing with self-represented litigants."[91]

[46] The Family Court has been a focus for the judiciary in Ontario. The Toronto Region Family Courts Committee established a Working Group on Unrepresented Litigants which issued its unpublished report in March 1997.[92] The Chief Justice of the Ontario Superior Court struck a Special Judicial Committee "to make suggestions as to how judges of our court might approach cases involving self-represented litigants."[93] The recommendations are contained in a 1999 Report.[94]

[47] As well, recent years have seen a number of judicial conferences on how the judiciary should respond to self-represented litigants, with attempts being made to develop appropriate protocols and procedures.[95] The Canadian Institute for the Administration of Justice is interested in ongoing research.[96]

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[89] CFCJ CJC Project, *supra* note 30 and accompanying text.

[90] Lowe, *supra* note 31 at 5.

[91] *Ibid.*

[92] Toronto Region Family Courts Committee, *supra* note 66.

[93] The Honourable Justice N. Douglas Coo, The Honourable Justice George Czutrin & The Honourable Sandra Chapnik, *Judicial Committee Report on Self-Represented Litigants* (Ontario: Superior Court of Justice, 1999), online: The Advocate's Society <http://www.advocates.ca/publications/pdf/1999.pdf>.

[94] *Ibid.*

[95] Devlin, *supra* note 17 at note 87 and accompanying text.

[96] The Honourable Barry L. Strayer, "Self-Represented Litigants" (Paper presented at the National Judicial Institute Presentation, 23 May 2003) [unpublished], summarized in Barrett-Morris, Aujla & Landerkin, *supra* note 22.

[48] The Alberta Court of Appeal has commented on the challenge self-represented litigants pose to the legal profession.[97] In dealing with the question whether an agent could speak at a hearing on behalf of a self-represented litigant, the Court stated:

> By far the most satisfactory solution would be a concerted effort on the part of the legal profession to encourage its members to represent the impecunious and poorly educated, but worthy litigants on a *pro-bono* basis. The alternative may not be palatable to the Bar: the legislature of Alberta might well amend the *Legal Profession Act* to permit paralegals ... to perform many of the functions now reserved for lawyers.

Of course, the important issue for the legal profession "is not merely preserving the privilege of self-governance, but rather, recognizing and fulfilling the obligation to promote equal access to justice for all members of the public."[98] This is "a challenge the profession has demonstrated it accepts willingly and enthusiastically."[99]

3. Legal profession

[49] The legal profession is playing its part in addressing the self-represented litigant phenomenon. In its 1996 Report, the Canadian Bar Association Task Force on Systems of Civil Justice addressed the need for better education of the public about dispute resolution and the need for improved information and advice for individuals confronted with a civil dispute.[100] It proposed the development of an optimal information and referral system with lawyers continuing to have a crucial role in providing point-of-entry advice to persons considering legal action. Significantly enhanced information and advice would be available at the courthouse, and every court would undertake initiatives to assist self-represented litigants, for example, by simplifying procedures and forms and using plain language.[101] The Task Force also called on government to improve legal aid funding, and called on the legal profession to recognize its responsibility toward self-represented litigants by providing more pro bono work. The Canadian Bar Association has since established a Pro Bono

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[97] *Pacer Enterprises Ltd. v. Cummings* (2004), 346 A.R. 161 at para. 19, 2004 ABCA 28 [*Cummings*].

[98] Douglas Mah, "Pro Bono services continue to be needed" *The Advisory* 2:3 (2004) at 3.

[99] *Ibid.*

[100] CBA 1996 Report, *supra* note 55 at 54.

[101] *Ibid.*, Recommendations 27 and 28.

Committee which issued a report in 2003.[102] In 2004, the Council of the Canadian Bar Association approved $500,000 in funding to mount a test case to establish a constitutional right to civil legal aid in Canada.[103] A four-person legal team has been named for the purpose.[104]

[50] The Benchers of the Law Society of Alberta have established a Pro Bono Committee. A report setting out its strategy on the delivery of pro bono legal services is available on the Society's website.[105] The Committee plans more consultation with the profession about "developing and implementing a comprehensive strategy to further enhance the provision of pro bono legal services in Alberta."[106] Examples of "[s]ome tremendous strides [that] have been made in the provision of pro bono legal services in Alberta" include:[107]

> ... the establishment of the Edmonton Centre for Equal Justice, the family law bar's Dispute Resolution Officer Program, the continuing 30 year excellence of Calgary Legal Guidance and the pro bono initiative now underway in Red Deer led by the Central Alberta Bar Association.

[51] Continuing legal education is another area where the legal profession has been active. For example, the continuing legal education program at the Canadian Bar Association National Meeting in Winnipeg in August 2004 provided the Bar "with an opportunity to consider practical responses and to open up dialogue about system-

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[102] Canadian Bar Association Pro Bono Working Group, *Mid-Winter 2003 Report* (Ottawa: Canadian Bar Association, 2004), online: <http://www.cba.org/ABC/pdf/03-04-M-Background.pdf>. Devlin, *supra* note 17, describes the CBA activity post-1996 in some detail. He finds the follow-up disappointing.

[103] Susan McGrath, "Taking Action: A $500,000 Commitment to Legal Aid" CBA *National* (October 2004) 6.

[104] Canadian Bar Association, News Release, "CBA Announces Legal Team to Lead Court Challenge on Constitutional Right to Legal Aid" (19 February 2005), online: <http://www.cba.org/CBA/News/2005_Releases/PrintHtml.asp?DocId=62410>.

[105] The Law Society of Alberta, *Pro Bono Publico – For the Public Good: Report of the Pro Bono Committee* (April 2003), online: <http://www.lawsocietyalberta.com/files/reports/probono03.pdf>.

[106] Mah, *supra* note 98.

[107] *Ibid.*

wide changes which will respond to the many challenges of unrepresented litigants."[108]

[52] The emergence of Pro Bono Students Canada is another innovation. Established at the University of Toronto Faculty of Law in 1996, Pro Bono Students Canada is "a national network of law schools and community organizations that matches law students who want to do pro bono work with public interest and non-governmental organizations, government agencies, tribunals and legal clinics, and lawyers."[109] "Every student project is supervised by a lawyer."[110] Today, the program is in 17 law faculties across Canada, including the Universities of Alberta and Calgary.[111]

4. Legal aid

[53] Legal aid bodies are looking for ways of serving a broader clientele with the dollars at their disposal. In September 2004, the Legal Aid Society of Alberta announced the creation of AtLAS, the Alberta Law Call Centre, to provide "a centralized, easy to access source of legal information, resource referrals, and summary advice for Albertans in need."[112] The searchable online database providing access to legal information and resource referral services is free to all.[113] Persons calling in for summary advice must meet the needs test defined by the Legal Aid Eligibility Guidelines.[114] Legal Aid Ontario has also made efforts to determine less costly, more effective ways of delivering legal aid services to a wider range of

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[108] Lowe, *supra* note 31 at 5.

[109] See online: Pro Bono Students Canada (PBSC) <www.law.utoronto.ca/probono/index.htm>.

[110] Pamela Shime, "History and Overview", online: <www.yorku.ca/osgoode/pbsc/history.htm>.

[111] Pro Bono Students Canada, University of Western Ontario, online: <www.law.uwo.ca/mainSite>, under Community Resources / News & Events.

[112] The Legal Aid Society of Alberta, promotional literature distributed September 2004.

[113] Online: AtLAS Alberta Law Call Centre <www.atlaslaw.ab.ca/>.

[114] Other provinces have launched similar initiatives. Lowe, *supra* note 31 at 6, mentions two in British Columbia: (1) a collaborative project being conducted by the BC Law Courts Education Society in conjunction with partners throughout the justice community to create the BC Self-Help Centre which will pilot in the main Vancouver Courthouse.; and (2) a Law Line established by the Legal Services Society of BC to provide telephone access to brief legal services to people with low income. Interesting features of the Law Line include that it is staffed by lawyers and paralegals and is accessible in many different languages through an online interpreter service.

persons.[115] Its services include legal aid clinic coverage and the provision of duty counsel in civil litigation.[116]

5. Court administrators

[54] Court administrators are searching for ways to respond effectively to the growing numbers of self-represented litigants. They field information requests made by self-represented litigants at the court counter. The Association of Canadian Court Administrators is involved in ongoing research on this topic.[117] The program at their annual Education Conference in Halifax in March 2004 focussed on the administration of the courts and self-represented litigants.

6. Public legal education

[55] Public legal education and information organizations are also doing their part. The Public Legal Education Network of Alberta is comprised of "over 100 agencies, organizations and individuals united by their common interest in educating the public about law and justice."[118] Most of its members "are involved in providing law related education and information services to the public on a not-for-profit basis."[119]

G. Conclusion

[56] The relationships that exist within, or otherwise affect, the civil justice system are complex. Courts acting alone cannot meet all of the challenges that arise from the presence of growing numbers of self-represented litigants seeking justice through civil action. Our exploration is restricted even further than the scope of operation of the

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[115] See generally, online: Legal Aid Ontario <http://www.legalaid.on.ca/en/publications/Reports.asp>.

[116] For recent updates, see: Legal Aid Ontario, *Moving Towards Completing the Client Service Journey, 1999-2004*, online: <http://www.legalaid.on.ca/en/publications/PDF/Accomplishments-2004.pdf>; and Legal Aid Ontario, *Business Plan 2004-2005: Completing the Client Service Journey*, online: <http://www.legalaid.on.ca/en/publications/PDF/Business_Plan-2004.pdf>.

[117] See online <http://www.acca-aajc.ca/>.

[118] Public Legal Education Network of Alberta, "A Network of Networks" (September 2004), online: <www.solgen.gov.ab.ca/crime_prev/downloads/planning_guide_2004/1_message-partners.pdf>.

[119] *Ibid.* See also Lois E. Gander, "The Changing Face of Public Legal Education in Canada" *News & Views on Civil Justice Reform* 6 (Summer 2003) 4, online: <http://www.cfcj-fcjc.org/news.htm>. This issue contains other articles and a cross-country snapshot on public legal education and information initiatives across Canada.

superior courts. We are looking at reforms that could be carried out through revision of The Rules alone.

[57] In the next chapter, we examine possible modifications to the existing rules relating to self-representation. In chapter 3, we expand our inquiry to consider other changes that could be made in the general rules to more effectively meet the challenges posed by self-represented litigants.

CHAPTER 2. RULES REFORM AND THE RIGHT OF SELF-REPRESENTATION

ISSUE No. 1
Should the Rules be altered with respect to any of the following:

(a) right of self-representation;
(b) the restrictions on representation by mentally disabled persons, minors, corporations, or persons acting in a representative capacity;
(c) right of audience before the court to
(i) non-lawyer agents, or
(ii) McKenzie friends;
(d) assistance with preparation for court;
(e) changes to or from self-representation.

[58] Part 1.1 of The Rules governs "audience before the court." It covers representation by a lawyer, self-representation, and representation by a non-lawyer agent.[120] The provisions reflect three competing values and the ongoing tensions among them. The three values are: "the lay litigants' right to effective access to justice; the court's desire for administrative convenience; and the interests of regulated legal services providers."[121]

A. Rule 5.2: Representation by a Lawyer

[59] The civil justice system provided by the Court of Queen's Bench and Court of Appeal of Alberta is essentially a professional system. It is said to run best when qualified persons (lawyers, court administrators and judges) perform the roles for which they are trained.[122] As previously noted, for the most part self-represented litigants lack the skills and abilities associated with legal professionals. The system is constructed on the basis of litigant representation by legal counsel. This policy is

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[120] The Honourable W.A. Stevenson & The Honourable J.E. Côté, *Alberta Civil Procedure Handbook 2005* (Edmonton: Juriliber, 2005) at 20, note that the Rules Committee has recommended the repeal of Part 1.1 but that Cabinet has not acted on this recommendation.

[121] Richard Moorhead, "Access or Aggravation? Litigants in Person, McKenzie Friends and Lay Representation" (2003) 22 C.J.Q. 133, summarized in Barrett-Morris, Aujla & Landerkin, *supra* note 22.

[122] In contrast, the *Provincial Court Act*, R.S.A. 2000, c. P-31, s. 62(1), gives litigants seeking to resolve the civil claims designated in s. 9.6(1)(a)(i) the option of appearing by barrister and solicitor or (non-lawyer) agent. This jurisdiction of the Provincial Court is limited to claims for $25,000 or less: Alta. Reg. 329/89, s. 1.1.

embodied in the *Legal Profession Act*[123] and in Rule 5.2 which reinforces the policy established in the Act. Rule 5.2 provides:

> Subject to this Part, a person shall only be represented before the Court by a solicitor.

The Alberta provisions in this regard are consistent with the provisions in all other Canadian jurisdictions.

POSITION OF THE COMMITTEE

[60] The Steering Committee does not propose any change in the policy of Rule 5.2.

B. Rule 5.3: Exception for Self-representation

[61] The provisions for solicitor representation notwithstanding, both the *Legal Profession Act*, s. 106(2)(h) and (i),[124] and Rule 5.3 recognize and reinforce the fundamental right granted to a person at common law to represent themself. As stated in chapter 1, the right of a person to represent themself in legal proceedings is associated with the principle of access to justice. Rule 5.3 provides:

> An individual may represent himself before the Court.

Here again, the Alberta rule is consistent with the rules in other Canadian jurisdictions, all of which allow individual litigants to appear personally as well as by a lawyer.

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[123] R.S.A. 2000, c. L-8, s. 106 (practice of law). Subsection (1) provides:

> 106(1) No person shall, unless the person is an active member of the Society,
>
> (a) practise as a barrister or as a solicitor,
>
> (b) act as a barrister or as a solicitor in any court of civil or criminal jurisdiction,
>
> (c) commence, carry on or defend any action or proceeding before a court or judge on behalf of any other person, or
>
> (d) settle or negotiate in any way for the settlement of any claim for loss or damage founded in tort.

[124] S. 106(2) provides:

> 106(2) Subsection (1) does not apply to the following:
>
> (h) a person who acts on the person's own behalf in an action, matter or proceeding to which the person is a party;
>
> (i) a person in respect of the preparation by the person of a document for the person's own use or to which the person is a party.

[62] An overarching question is whether the right of self-represented litigants to represent themselves should be left in its current state or changed. The right of self-representation tends to be taken as a given. Commentators do not inquire into whether this right should be retained, removed, restricted or extended. It is probably assumed that the right of self-representation, at least at some level, is a constitutional entitlement. In *B.C.G.E.U. v. British Columbia (Attorney General)*,[125] the Supreme Court of Canada referred to an implicit constitutional guarantee of a right of access to the courts.[126] A denial of the right of self-representation might effectively preclude an individual from commencing or defending an action, and thus violate the constitution.[127]

[63] Needless to say, the existence of the right of self-representation does not make self-representation the best choice:[128]

> What is permissible is not desirable. The present legal system is adversarial in nature. It depends on proper pleadings from all parties to identify the issues, the ability to identify or elicit relevant evidence and bring it before the court in proper form and the ability to ascertain the applicable statutory or case law authorities and bring them to the attention of the court in a cogent manner. The appropriate balance between litigation adversaries is less likely to be found where one party is represented by counsel and the other is self-represented.

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[125] [1988] 2 S.C.R. 214, upholding an injunction prohibiting picketing in front of a courthouse. American law, reviewed in J. Goldschmidt *et al.*, *Meeting the Challenge of Pro Se Litigation: A Report and Guidebook for Judges and Court Managers* (Chicago: American Judicature Society and State Justice Institute, 1998) at 19-24, is supportive of the concept of a constitutional right of self-representation.

[126] More recently, in *Polewsky v. Home Hardware Stores Ltd.*, [2000] O.J. No. 81, the Ontario Superior Court of Justice granted Polewsky's application for leave to appeal the dismissal of his motion to waive the payment of the Small Claims Court fees on the basis of poverty, on the basis that (at para. 21) "the constitutional issues in this case are a matter of great public importance and should be carefully addressed at the appellate level." On Jan. 13, 2004, the Ontario Court of Appeal granted an intervenor in the case leave to appeal: [2004] O.J. No. 954. In *Pearson v. Canada*, [2002] S.C.C.A. No. 498, the Supreme Court of Canada dismissed an application for leave to appeal the trial judge's decision to waive Pearson's obligation to pay various court fees under the *Federal Court Rules, 1998*, r. 55 [Federal]. Federal, r. 55 provides: "In special circumstances, on motion, the Court may dispense with compliance with any of these Rules." There was no need in this case to consider relief from the payment of court fees on constitutional grounds.

[127] Such an argument might also be made regarding existing restrictions on the right of "self-representation" pertaining to disabled individuals, minors or corporations: see below at 32 and following.

[128] *Moss v. NN Life Insurance Co. of Canada* (2004), 180 Man. R. (2d) 253 at para. 2, (2004) MBCA 10 [Moss].

As noted in chapter 1, a body of evidence indicates that litigants represented by legal counsel fare better in court than litigants who represent themself.[129] This is one reason why, under the Charter, in narrowly-defined circumstances, a litigant may have the right to state-paid legal representation.[130]

[64] The trial judge and Court of Appeal discussed the responsibilities of a trial judge to an unrepresented litigant in the case of *R. v. Hardy*.[131] As a result, today, "[w]henever there is an opportunity to do so, the court will give an unrepresented litigant what has become known in Alberta as a "Hardy" warning:[132]

> The trial judge will try to identify the classes of jeopardy faced by the particular litigant in the particular trial. The trial judge will explain that a person's interests are always better served when they are represented by a lawyer. If the person does not have enough money to hire a lawyer, the judge will identify the services available in the community from Legal Aid or Student Legal Services. ...

[65] The right of self-representation does not apply universally. For example, it is well established in Alberta and elsewhere that before a litigant can be self-represented, they must have the capacity to self-represent and the capacity to sue.

[66] ***Capacity to self-represent***. The right of self-representation is subject to the trial judge's assessment of the litigant's capacity to self-represent. The duty of the trial

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[129] Trussler, *supra* note 25, refers to "a belief in the United States that self-represented litigants do not do as well as those represented by counsel." In support of this statement, she cites Dianne Molvig, "Unbundling Legal Services" *Wisconsin Lawyer* 70:90 (September 1997) 10; and Forrest S. Mosten, "Unbundling of Legal Services and the Family Lawyer" (1994) 28 Fam. L.Q. 421.

[130] *New Brunswick (Minister of Health and Community Services) v. G (J.)*, [1999] 3 S.C.R. 46. For a commentary on this case, see Barbara Billingsley, "Is There a Constitutional Right to Paid Legal Counsel in a Civil Law Matter?: An Analysis of the Supreme Court of Canada's Findings in *New Brunswick (Minister of Health and Community Services) v. G (J.)*" *News & Views on Civil Justice Reform* 3 (Spring 2000) 4, online: <www.cfcj-fcjc.org/news.htm#issue 3>. See also: Canadian Bar Association, *Making the Case: The Right to Publicly-Funded Legal Representation in Canada* (Ottawa: Canadian Bar Association, 2000), online: <www.cba.org/CBA/pdf/2002-02-15_case.pdf>, a collection of papers by eight leading academics in Canada which lead to the conclusion that "at present, Canada's policy makers do not have a clear constitutional obligation to ensure that Canadians can actually access our justice system to enforce their legal rights. While there is an implied right to legal aid in certain circumstances, the parameters of this right are cloudy" (foreword).

[131] *R. v. Hardy* (1990), 111 A.R. 377 (Q.B.); *R. v. Hardy* (1991), 120 A.R. 151 (C.A.).

[132] *Karach v. Karach*; *Connors v. Connors* (1995) 177 A.R. 100 at para. 17 (Q.B.) [*Karach*].

judge and the test for capacity are currently established by case law. The trial judge "must be careful to ensure that the unrepresented person shows sufficient capacity to self-represent to ensure the adjudicative fairness to which the person is entitled."[133] The test for capacity for self-representation is found in the case of *Vysek v. Nova Gas International*. It requires that the individual be able to:[134]

1. understand the nature or object of the proceeding;
2. understand the possible consequences of the proceeding;
3. understand that decisions made about the case have consequences; and
4. communicate with the Court and witnesses, which includes an ability to frame intelligible questions, comprehend the answers to question and articulate an argument.

Neither an individual's ability to advance the legal case nor the fact of suffering from delusions are useful measures of capacity for self-representation.[135]

[67] ***Capacity to sue***. An example of a situation in which a person lacks capacity to sue is provided by a party who has filed bankruptcy and receivership. Such a party ceases to have capacity to deal with the property.[136]

[68] Other exceptions from the right to self-represent are made in the case of actions on behalf of persons under legal disability or brought by persons serving in a representative capacity and in the case of corporations. The effect of Rule 5.3, as interpreted in the case law, is in line with the approach taken in other Canadian jurisdictions. However, the rules in those jurisdictions set out certain exceptions. The new Alberta rules could do likewise.

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[133] *Garand v. Mutual of Omaha Insurance*, 2001 ABQB 726 at para. 17.

[134] *Vysek v. Nova Gas International Ltd.*, 2001 ABQB 726 (Rawlins J.) at paras 173-176 [*Vysek*], citing on the fourth point *Bilek v. Constitution Insurance* (1990), 49 C.P.C. (2d) 304 (Ont. Dist. Ct.) and *R. v. Taylor* (1992), 77 C.C.C. (3d) 551 (Ont. C.A.).

[135] *Vysek, ibid.*.

[136] *Hoff v. Gerk* (1999), 252 A.R. 86, 1999 ABQB 744. A bankrupt only has the right to bring a personal action (*Hoff* at para. 35, citing *Rahall v. McLennan* (1996), 44 Alta. L.R. (3d) 179 (Q.B.)). Upon assignment into bankruptcy, "causes of action are vested in the Trustee at that time and the bankrupt person has no status to deal with the action" (*Hoff* at para. 37, citing *Long v. Brisson* (1992), 3 Alta. L.R. (3d) 79 (C.A.)).

[69] ***Actions on behalf of a person under legal disability or brought by persons serving in a representative capacity***. Under Alberta case law, where individuals commence actions on behalf of a person with a disability or in a representative capacity, legal representation is generally required.[137] In most Canadian jurisdictions, the rules specify that a party under legal disability or acting in a representative capacity shall be represented by a solicitor.[138] In Nova Scotia, a person serving in a representative capacity may act by a solicitor or in person.[139] In British, Columbia, Newfoundland and Nova Scotia a person under disability is required to act by guardian ad litem, who shall act by a solicitor.[140]

[70] ***Corporations***. Under Alberta case law, with a few exceptions, corporate litigants must be legally represented, unless the court exercises its discretion to permit a non-lawyer agent to appear.[141] In most Canadian jurisdictions, the rules specifically require a corporation to be represented by a lawyer.[142] Of these, most also recognize a discretion in the court to permit exceptions.[143] Ontario Rule 15.01(2) recognizes a power in the court to permit an agent to represent a corporate party. Holmested and Watson view this as a codification of the law that had developed in Ontario and other

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[137] *Salamon v. Alberta (Minister of Education)* (1991), 120 A.R. (2d) 298, 83 Alta. L.R. 275 (C.A.) re minors. (In our Rules Project, the issue of who may litigate on behalf of a person under disability is dealt with in Alberta Law Reform Institute, *Parties* (Consultation Memorandum No. 12.4) (Edmonton: Alberta Law Reform Institute, 2003). However, the issue whether the "litigation representative" must in turn, be represented by a lawyer, is left to this Consultation Memorandum.

[138] Ontario, r. 15.01(1); Manitoba, *Court of Queen's Bench Rules*, r. 15.01(1) [Manitoba]; *Saskatchewan Queen's Bench Rules*, r. 10(1) [Saskatchewan]; *Rules of Court of New Brunswick*, r. 17.01 [New Brunswick]; Prince Edward Island, *Rules of Civil Procedure*, r. 74.11 [Prince Edward Island]; *Rules of the Supreme Court of the Northwest Territories*, r. 7(1) [Northwest Territories]; and Federal, r. 121.

[139] *Nova Scotia Civil Procedure Rules*, r. 9.08(1) [Nova Scotia].

[140] British Columbia, *Supreme Court Rules*, r. 6(2) [British Columbia]; Newfoundland, *Rules of the Supreme Court, 1986*, r. 1.07(1) [Newfoundland]; Nova Scotia, r. 9.08(1).

[141] *Rangelander Holdings Ltd. v. Calgary (City)* (1996), 196 A.R. 127 (C.A.) [*Rangelander Holdings*], adopting the reasoning in *Professional Sign Crafters (1988) Ltd. v. Wedekind* (1994), 19 Alta. L.R. (3d) 53 (Q.B.) [*Professional Sign Crafters*]. In *Professional Sign Crafters*, the court refused to allow the corporation's the sole director and officer to represent it.

[142] Ontario, r. 15.01(2); Saskatchewan, r. 10(2); New Brunswick, r. 17.01; Newfoundland, r. 5.07(2); Prince Edward Island, r. 15.01(b); Northwest Territories, r. 7(2); and Federal, r. 120.

[143] Ontario, r/ 15.01(2).; Saskatchewan, r. 10(2); Nova Scotia, r. 9.08(2); Prince Edward Island, r. 15.01(b); Northwest Territories, rr. 7(2) and (4); and Federal, r. 120.

provinces.[144] They add that "few guidelines for the exercise of this discretion have been developed," although "impecuniosity is a factor." Manitoba and Nova Scotia allow representation by a duly authorized officer resident in the province.[145] Prince Edward Island likely allows representation by an officer or employee of a corporation or partnership or, with leave of the court, by an unpaid agent.[146] (We discuss representation by an agent under heading C.)

POSITION OF THE COMMITTEE

[71] The Steering Committee accepts as a given the right of persons litigating for themselves to represent themselves. We considered problems associated with the examination and cross-examination of parties by a self-represented litigant, for example, in a case involving allegations of physical or sexual abuse. An analogy could be drawn to the criminal law rules which make exceptions from the right of self-representation in situations of this sort. However, we concluded that in civil cases it would be preferable to leave issues relating to examination and cross-examination to the discretion of the court in the exercise of its inherent jurisdiction to control the proceedings before it.

[72] The right to self-represent could be extended to a person acting in a representative capacity, as in Nova Scotia, or to an officer of a corporation, as in Manitoba and Nova Scotia. The Steering Committee considered these options, but decided against changing the rules to allow persons in either of these categories to act on their own. The reasons underlying section 106(1) of the *Legal Profession Act* that prevent unqualified persons from practicing law apply more strongly than ever in cases where persons, because of minority, mental disability or some other legal incapacity, are unable to represent themselves. Such persons should not be subjected to the risks associated with representation by a person who is less than thoroughly trained in law, does not understand legal procedure and who is not subject to professional codes of conduct and etiquette.

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[144] Professor Garry D. Watson & Mr. Justice Craig Perkins, *Holmested and Watson Ontario Civil Procedure*, looseleaf (Toronto: Thomson Carswell, 1984) [Holmested & Watson].

[145] Manitoba, r. 15.01(2); Nova Scotia, r. 9.08(2).

[146] Prince Edward Island, r. 74.11.

[73] The new rules should make the position under the case law clear. That is to say, generally corporations and persons acting on behalf of a person under legal disability or serving in a representative capacity cannot self-represent but the court has the discretion to allow them to do so in appropriate circumstances.

C. Rule 5.4: Representation by a Non-lawyer Agent

[74] Rule 5.4 embodies another exception from the requirement for representation by a qualified lawyer.[147] It codifies the discretion the court may exercise to give audience to an agent in extraordinary circumstances.[148] This discretion is part of the inherent jurisdiction of superior courts to control their own procedure, including to decide whom the court will permit to address it. This jurisdiction can be taken away or modified only by clear statutory language. It is unaffected by the *Legal Profession Act*. Rule 5.4 provides:

> With the permission of the Court, a person may be represented before the Court by an agent other than a solicitor.

The rules in other provinces, although not identical, are similar in effect.[149]

[75] The court's discretion to give audience to an agent may be exercised to allow a self-represented litigant to receive the assistance of a non-lawyer "before the Court." The judgments in recent Alberta cases draw a distinction between "right of audience" in court and the right to practice law as set out in the *Legal Profession Act*.[150] The

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[147] A further exception may exist where legislation that establishes a constitutionally valid administrative process for the determination of certain rights specifically permits non-lawyers to appear: *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113, 2001 SCC 67.

[148] *Cummings*, *supra* note 97, citing *Rangelander Holdings*, *supra* note 141, which adopted the reasoning in *Professional Sign Crafters*, *supra* note 141, citing *Collier v. Hicks* (1831), 2 B. & Ad. 663, 109 E.R. 1290 (K.B.) and *Abse v. Smith*, [1986] 1 All E.R. 350 (C.A.). It has long been recognized that, absent a statutory prohibition, courts have a discretion regarding who may advocate before them: *Children's Aid Society (Niagara Region) v. P.(D.)* (2002), 62 O.R. (3d) 668 at para. 9 [*Children's Aid Society*], citing *Re MacQueen and Nottingham Caledonian Society* (1861), 9 C.B.N.S. 793, 142 E.R. 312 (H.C.) and *Ex parte Graves* (1891), 8 W.N. (N.S.W.) 44, giving the example of allowing a person to conduct the case for a party who had a speech impediment. Note that the representation by a non-lawyer agent is allowed by the *Provincial Court Act*, referred to *supra* note 122, does not extend to appeals from the Civil Division to the Court of Queen's Bench: *Provincial Court Act*, s. 62(2) and *Hoff v. Gerk*, *supra* note 136 at para. 44.

[149] See Trussler, *supra* note 25 at 550-560 for a detailed comparison of the rules governing agency in family matters.

[150] *Cummings*, *supra* note 97 at paras. 3, 8 and 9, citing *Rangelander Holdings* and *Professional Sign*

(continued...)

judgment of the Alberta Court of Appeal in the case of *Pacer Enterprises Ltd. v. Cummings*[151] establishes that representation under Rule 5.4 is limited to the "right of audience" in court.

[76] In the *Cummings* case, the trial judge had granted audience to Mr. Montgomery on behalf of a party who was 43 years old, had a grade 3 education, could barely read, had a limited income and could not afford a lawyer. The trial judge reasoned that it would be unfair "to stack an experienced lawyer against an uneducated man" and that an unfair playing field may be able to be levelled "in some small measure" by granting audience to Mr. Montgomery. Mr. Montgomery was a self-employed "paralegal/court agent." The Law Society of Alberta appealed the decision, arguing that: Mr. Montgomery was not subject to any professional code of conduct or to any disciplinary procedures for improper practice; he was not insured; and opposing litigants would be denied the protection afforded by the code of conduct and ethics that govern practising barristers and solicitors and is policed by the Law Society.[152] The Court of Appeal upheld the trial judge's decision. In doing so, the Court identified a number of factors for a judge to consider in exercising the discretion to grant an audience to a non-lawyer as agent for another person. Those factors include:[153]

> ... whether the agent has a family relationship with the litigant, whether the agent is offering its services for a fee, the economic hardship that might be suffered by the litigant, and whether the denial of the application would effectively deny the litigant the benefit of any representation.

At the same time, it noted that serious policy considerations support the argument that the practice of law should be restricted to lawyers.[154]

> [Court advocates] should be members of a profession or professions subject to a strict code of discipline and etiquette and who have been

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[150] (...continued)
Crafters, *supra* note 141.

[151] *Cummings*, *ibid.*

[152] *Cummings*, *ibid.* at para. 12.

[153] *Cummings ibid.* at para. 13, citing *Burton v. Burton* (1996), 39 Alta. L.R. (3d) 201 (Q.B.) and *Strilets v. Vicom Multimedia Inc.* (2000), 272 A.R. 376, 2000 QBQB 598.

[154] *Abse v. Smith*, *supra* note 148 at 361.

> thoroughly trained and practised in the skills of advocacy, in the proper and expeditious conduct of litigation and in the law.

It is a balancing act. The court weighs the objective of "protecting the litigant" and society alongside the objective of "respecting the choice of the litigant."[155]

[77] The Court of Appeal judgment in the *Cummings* case identifies some of the boundaries between the "privilege of audience" and the right to practice law. The question is one of degree.[156] "The right of audience ... does not ... authorize the agent to assist in the preparation, issuance and filing of documents in relation to the ongoing litigation."[157] However, a distinction can be made between "filling in blanks in a standard form" which may not require a lawyer and "the drafting of an instrument from a mass of facts, with regard to existing law, in order that a particular result be reached and that another be avoided" which "falls squarely within the definition of 'practice of law.'"[158]

[78] The right to be represented by an agent overlaps with the issue of the right of a mentally disabled person, minor or corporation to "self-represent" with the assistance of a non-lawyer. As has been seen, the case law requiring representation by a lawyer generally precludes the use of a non-lawyer agent in these situations.

[79] In Alberta, a motion for permission to be represented before the Court by an agent may be brought *ex parte*.[159] In Ontario, a motion of a similar sort must be "on notice to all parties and, where possible, in writing."[160] The Alberta rules could introduce the Ontario requirement.

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[155] *Karach*, *supra* note 132 at para. 18.

[156] *Cummings*, *supra* note 97 at para. 15.

[157] *Ibid.* at para. 14, citing *Allen Qui Tam v. Jarvis* (1871), 32 U.C.R. 56, a case stating that the preparation of documents to be used in Court fell within the prohibition of practising, directly or indirectly, in the legal profession.

[158] *Cummings*, *ibid.* at para. 14, citing *R. v. Nicholson* (1979), 8 Alta. L.R. (2d) 299 (C.A.), McDermid, J.A.

[159] *Karach*, *supra* note 132.

[160] *Children's Aid Society*, *supra* note 148.

POSITION OF THE COMMITTEE

[80] The committee does not propose any change to Rule 5.4 as applied in the *Cummings* case. The Legislature has chosen to restrict the practice of law to members of the legal profession, and we agree with this restriction. While we recognize the difficulties that limiting the role of non-lawyer agents to audience before the court places on self-represented litigants, we prefer to look for ways that self-represented litigants could be assisted without changing the existing boundaries between legal representation, advice and information. (See our discussion below, under heading E: Assistance with Preparation for Court.)

[81] As in Ontario, we propose that the new rules should require a motion for permission to be represented before the court by an agent to be brought on notice to all parties and, where possible, in writing.

D. Assistance by a "McKenzie Friend"

[82] Closely related to the issue of representation by a non-lawyer agent is the issue of assistance by a "McKenzie friend." A McKenzie friend is a person whom the court allows to assist a self-represented litigant in a hearing so that the self-represented litigant may better present their case:[161]

> A McKenzie friend is a person who provides support, ranging from a role similar to a legal expert (prompting the litigant to make useful points in representations, and examination of witnesses and giving advice) to the role of sympathetic supporter (who may help by taking notes, or offering comfort or moral support), but such a person does not take on the role of a lawyer.

The designation "McKenzie friend" comes from the British case which first allowed assistance of this nature.[162]

[83] The rationale for allowing a McKenzie friend is fairness to self-represented litigants. In the words of Lord Donaldson of England's Court of Appeal:[163]

> Fairness, which is fundamental to all court proceedings, dictates that [self-represented litigants] shall be given all reasonable facilities for

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[161] Moorhead, *supra* note 121, summarized in Barrett-Morris, Aujla & Landerkin, *supra* note 22.

[162] *McKenzie v. McKenzie*, [1970] 3 All E.R. 1034.

[163] *R. v. Leicester City Justice; Ex parte Barrow*, [1991] 3 All ER 935 at 943 (C.A.).

> exercising this right [to be heard in their own defence] and, in case of doubt, they should be given the benefit of that doubt for courts must not only act fairly, but be seen to act fairly ...

Later in the judgment Lord Donaldson states: "A party to proceedings has a right to present his own case and in so doing to arm himself with such assistance as he thought appropriate...."[164] Because the role of a McKenzie friend is adviser, not advocate, leave of the court is not required. However, the court may intervene to restrict the use of this assistance, for example:[165]

> ... if it was clearly unreasonable in nature or degree or if it became apparent that the 'assistance' was not being provided bona fide but for an improper purpose or was being provided in a way which is inimical to the proper and efficient administration of justice by, for example, causing the party to waste time, advising the introduction of irrelevant issues or the asking of irrelevant or repetitious questions.

Lord Justice Staughton likewise sees "in general no grounds for objecting to a litigant in person being assisted by a McKenzie friend.[166] In civil proceedings, where the court is open to the public, it is a small matter to allow a self-represented litigant to be "accompanied by an assistant who will sit beside him, take notes and advise *sotto voce* on the conduct of his case."[167] Where the court sits in chambers or in camera, the judge should consider whether this circumstance provides a sufficient reason to exclude the friend from whom the litigant wishes assistance.[168]

[84] Usually the McKenzie friend is a lay person who enjoys a personal relationship with the self-represented litigant. However, the English Court of Appeal would have allowed the assistance of a professional McKenzie friend in a case where the self-represented litigant was a party to a custody dispute.[169]

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[164] *Ibid.*

[165] *Ibid.* at 945-46.

[166] *Ibid.* at 947.

[167] *Ibid.*

[168] *Ibid.*

[169] *R. v. Bow County Court; Ex Parte Pelling.*, [1999] 4 All ER 751.

[85] In Canada, in the case of *Moss v. NN Life Insurance Co. of Canada*, the Manitoba Court of Appeal considered whether assisting as a McKenzie friend would amount to practising law.[170] It expressed the opinion that:[171]

> ... lending a helping hand to a self-represented litigant, without fee and on an isolated occasion, does not constitute a violation of [that province's *Legal Profession Act*] by "appear[ing] as a lawyer" before a court.
>
> The phrase "appear[ing] as a lawyer" means more than helping a self-represented litigant articulate a submission more clearly and effectively.

The non-lawyer "friend" was not allowed to represent the plaintiff or "to speak for her." However, the trial judge had a discretion to allow the friend to take a lesser role which could include: sitting beside the self-represented litigant during the legal proceedings; assisting her "by passing documents to her which she, in turn, might use to cross-examine a witness;" giving the self-represented litigant "a few moments to consult with [the 'friend'] before closing the examination or the cross-examination of a witness;" or allowing the friend to "add a brief comment to supplement the oral argument of [the self-represented litigant]."[172] The provisions of the *Legal Profession Act* in Manitoba and Alberta are similar, although the Alberta Act speaks of "act[ing]" as a lawyer rather than "appear[ing]" as a lawyer.

[86] An Ontario case will serve to illustrate the fine line between representation by an agent and assistance from a McKenzie friend.[173] In that province, the Family Law Rules allow a party to be represented "by a person who is not a lawyer, but only if the court gives permission in advance." This rule is comparable to Rule 5.4. Having observed that "[t]he Family Law Rules obviously were drafted with the intent of making them user-friendly" to self-represented litigants,[174] the judge found the limitations imposed on a McKenzie friend in England to be "overly severe"and "impractical" for the purpose. "The image of a sleeve-tugging, note-passing

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[170] *Moss*, *supra* note 128.

[171] *Ibid.* at paras. 13 and 14.

[172] *Ibid.* at para. 27.

[173] *Children's Aid Society*, *supra* note 148.

[174] *Ibid.* at para. 15.

whispering agent," she said, "does not bespeak a workable arrangement."[175] Instead, the assistance could "include asking questions of witnesses and extend to addressing the court." The judge drew a distinction between "paid, non-lawyer agents, such as paralegals, who are in the business of providing legal representation, and unpaid, non-lawyer agent-friends."[176] "Special circumstances" are required before allowing paid paralegal agents to appear whereas the test for unpaid non-lawyer agent-friends has a lower threshold.[177] The test for the assistance of an unpaid, non-lawyer agent-friend is "of the subjective-objective variety: ... does the self-represented litigant honestly believe that they would benefit from the assistance of the friend and does that belief appear to be reasonable in all of the circumstances?"[178] The prohibitions on representation in the *Solicitors Act*[179] and the *Law Society Act*[180] do "not affect the inherent discretion of the court to allow an unpaid, non-lawyer agent-friend to assist a litigant and serve as his or her advocate."[181]

[87] In some situations, the agent or McKenzie friend may be a representative of a special interest group who feels they "have an expertise" in the particular area of law and "wish[es] to put forward a certain philosophical point of view."[182] These may be the most difficult agents for the court to control if "their views become the predominant issue before the court, not the problems of those for whom they appear."[183]

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[175] *Ibid.* at para. 20.

[176] *Ibid.* at para. 8. The unpaid non-lawyer agent-friend seems to have been recognized by the Ontario Court of Appeal: *R. v. Lawrie and Pointts Ltd.* (1987), 59 O.R. (2d) 161 (C.A.) at 170.

[177] *Children's Aid Society*, *supra* note 148 at para. 21.

[178] *Ibid.* at para. 17.

[179] R.S.O. 1990, c. S.15, s. 1.

[180] R.S.A. 1990, c. L.8, s. 50(1) (repealed).

[181] *Children's Aid Society*, *supra* note 148 at para. 14. Note the contrast between Ontario's discretion in the court to allow the assistance of a non-lawyer agent-friend and England's right to be assisted by a McKenzie friend unless the court objects.

[182] Trussler, *supra* note 25 at 550.

[183] *Ibid.* at 560.

[88] The discretion to accept an application for the assistance of a McKenzie friend has been exercised in criminal proceedings in Australia.[184] There, "an application will not be favourably regarded if the litigant has not applied for or has refused legal assistance."[185] Australian courts have allowed non-lawyers to address the court on behalf of self-represented litigants in some cases.[186]

POSITION OF THE COMMITTEE

[89] The Steering Committee considered: whether the rules should permit a self-represented litigant to be accompanied by a McKenzie friend; whether or not leave should be required; if leave is required, what threshold test should apply; and what restrictions should be placed on the role of that friend. The Committee decided that Rule 5.3 should be altered to require the permission of the court for representation by a non-lawyer agent or the assistance of a McKenzie friend. Our purpose in taking this position is to avoid confusion in distinguishing between the two roles. In our view, the nuances of defining a line between representation by a non-lawyer agent and lay assistance that falls short of representation would create more problems than an additional provision would solve. We do not disagree with the usefulness and availability of the McKenzie friend type of assistance, just with the desirability of a separate rule defining it.

E. Assistance with Preparation for Court

[90] The restriction to audience before the court that has been placed on "representation" by a non-lawyer agent puts self-represented litigants in a difficult position. Indeed, a self-represented litigant's right of audience may "be nugatory

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[184] AIJA-LIP, *supra* note 13 at 8, citing *Schagen* (1993), 65 A. Crim. R. 500 (Ct. Crim. App.) and *Smith v. The Queen* (1985), 159 C.L.R. 532, 534 (H.C.A.). However, this form of assistance is regarded, as an "indulgence": AIJA-LIP, *ibid.*, citing *R. v. E.J. Smith*, [1982] 2 N.S.W.L.R. 608 (Sup. Ct.).

[185] AIJA-LIP, *ibid.*, citing John W. Perry, *The Unrepresented Litigant* (Paper presented at the 16th Annual Conference of the AIJA held in Melbourne, 4-6 September 1998).

[186] *Galladin Pty Ltd. v. Aimnorth Pty Ltd. and Ors* (1993), 60 S.A.S.R. 145. For an account of Australian caselaw dealing with whether a self-represented litigant can have the benefit of assistance or representation from a person who does not have the right of audience to appear before, or litigate through, the courts, see Moorhead, *supra* note 121, summarized in Barrett-Morris, Aujla & Landerkin, *supra* note 22.

unless one also has the collateral right to assistance in the preparation of documents."[187]

1. Options for assistance

[91] How will an inexperienced self-represented litigant needing to "prepare formal pleadings, motions, affidavits and memoranda of argument"[188] be able to prepare for court? According to the Court of Appeal in the *Cummings* case, the solution to the dilemma lies with other options. These include:[189]

- "the assistance of court officials in the offices of the Clerk of the Court or the Registrar ... to prepare documents that will comply with the administrative requirements of the Court and reflect the nature of the claim or the defence" – litigants must be informed that these officials are not qualified, nor competent to give legal advice;
- consulting student legal services "where legal advice is given under the supervision of a responsible member of the Bar"; and
- representation by members of the legal profession on a *pro-bono* basis – thought by the Court to be "[b]y far the most satisfactory solution."

Other responses are possible. These include:

- legal advice lines – which provide "access to lawyers (and often supervised paralegals) who will provide legal information and in appropriate cases, legal advice, to a client who calls in on a dedicated phone line;"[190]
- self-help centres – which provide legal advice and referrals, but not representation, to self-represented litigants;[191]

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[187] *Burton v. Burton*, *supra* note 153 at para. 44.

[188] *Cummings*, *supra* note 97 at para. 18.

[189] *Ibid.* at para. 19.

[190] Lowe, *supra* note 31 at 4.

[191] Self-help centres "can serve as a clearing house for resources such as educational materials and brochures as well as a place to obtain self-help booklets. They should be located in or near the courthouse to be easily accessible. Referrals can also be made to other legal resources and social services." Trussler, *supra* note 25 at 576.

- duty counsel – to provide limited advice and representation to unrepresented litigants appearing in court, including chambers and at trial;[192]
- legal aid – to provide full representation in civil matters to persons who are eligible on an income-tested basis,[193] or clinics "at a reasonable cost for litigants who do not meet legal aid criteria but have limited financial means."[194]
- unbundled legal services – not only in preparation for court, but also at case management or other conferences with a judge or during court hearings.[195]

[92] As stated previously, many of these options involve systemic change. They require the collaboration of government, the bar, the post-secondary education system and community organizations as well as the courts. The rules can support and adapt to such change, but are severely limited as a tool to achieve significant change on their own.

2. A fundamental tension: providing legal representation or assisting self-represented litigants

[93] Two contrasting strategies emerge from the wide variety of options that could be used to assist self-represented litigants with preparation for court. The first strategy is to improve the availability of legal representation. After all, the civil justice system is designed for professionals and litigants with legal representation fare better than self-

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[192] Lowe, *supra* note 31 at 4. See also Trussler, *supra* note 25 (footnote omitted):

> For an effective system there needs to be duty counsel or counsellors on site at the courthouse to screen cases. Some people have such enormous problems that they may need assistance in seeking legal aid. It should be possible to apply for legal aid at the courthouse. As well, duty counsel should be available to screen documents before they are filed and to give advice to those who attend at the courthouse in response to an application. This assistance could also be accomplished by lawyers providing unbundled services. A list of lawyers who provide this service could be made available.

[193] Lowe, *ibid.*, points out that:

> The CBA has been pursuing increased legal aid funding for years. While better funding should lead to an expansion of the types of matters that are covered, it is important to remember that there has only ever been limited legal aid coverage for civil matters (other than family) and so this will not resolve all situations involving unrepresented litigants.

[194] Trussler, *supra* note 25 at 576.

[195] See discussion below at 50 and following.

represented litigants. The second strategy is to empower self-represented litigants to better represent themselves by providing them with information and training. Some critics warn that providing resources to assist self-represented litigants may disempower them in the guise of empowering them.[196] It may also signal a devaluing of access to civil justice in the courts by under-privileged members of society or in areas of law, such as family law, that attract a high proportion of self-represented litigants.

[94] The tension between these two strategies is strong, making it "difficult to find a balance between the two positions."[197] The legal profession appears to favour the first strategy. Law societies and the Canadian Bar Association actively urge governments to improve funding for legal aid and encourage lawyers to engage in more *pro bono* activity. One Canadian legal academic argues for the imposition of mandatory *pro bono* requirements on the legal profession.[198] Governments appear to favour the second strategy. In recent years they have reduced funding for legal aid. They are directing their efforts toward public legal education initiatives and the promotion of dispute resolution alternatives that are less formal than court litigation. The position of the public appears mixed. Generally, members of the public wish to gain a better understanding of the workings of the legal system. Some individual litigants ("true self-represented litigants") choose to represent themselves; however, others would prefer to have legal representation but cannot afford it or cannot find a lawyer willing to take their case.

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[196] Elizabeth McCulloch, "Let me Show You How: *Pro Se* Courses and Client Power" (1996) 48 Fla. L. Rev. 481, summarized in Barrett-Morris, Aujla & Landerkin, *supra* note 22.

[197] Trussler, *supra* note 25 at 575. One way to ease the tension could be to distinguish proceedings in which procedures are designed for self-representation (as in the trial level of the Tax Court of Canada) from more complex proceedings in which the interests of efficiency support the provision of assistance to self-represented litigants: Australian Law Reform Commission, The *Unrepresented Party* (Adversarial Background Paper 4) (Sydney, NSW: Australian Law Reform Commission, 1996), citing R. Cranston, *Access to Justice: Background Report for Lord Woolf's Inquiry* (London: Lord Chancellor's Department, 1995.

[198] Devlin, *supra* note 17.

[95] We have seen that overall, the needs of self-represented litigant are wide-ranging. In individual cases, they are variable:[199]

> The problems faced by unrepresented litigants and applicants vary depending on their individual capabilities, the complexity of the proceedings, whether they are applicants or respondents, and the extent of assistance available by advisers or court staff.

As mentioned earlier, and the Court of Appeal of Alberta recognizes,[200] many self-represented litigants need expert help and advice. Simply providing information is not enough.[201]

POSITION OF THE COMMITTEE

[96] The Steering Committee takes the general position that a project on rules reform is not the appropriate vehicle for considering how to provide self-represented litigants with the information they need to prepare for the court. The responsibility to prepare pamphlets or otherwise provide information and assistance lies with bodies such as Alberta Justice, the Legal Aid Society and the Law Society of Alberta. We note, however, that including a more comprehensive set of forms with the rules would assist self-represented litigants and this is something that the Rules Project is working on. Various sub-Committees have recommended forms, and these will be developed in the course of the drafting process. To further assist litigants, these forms could be made available in electronic format.

3. A role for the rules

[97] In the following paragraphs, we explore two possibilities for rules changes that could aid self-represented litigants in preparing for court. One possibility involves relaxation of the boundary between legal information and legal advice. The other possibility involves expanding the role of paralegal service providers. The delivery by lawyers of unbundled legal services affords a third means of helping self-represented litigants prepare for court. In the final section of this chapter, we discuss issues for the rules that arise when lawyers assist self-represented litigants on a limited basis.

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[199] Australian Law Reform Commission, *Managing Justice: A Review of the Federal Justice System* (Report No. 89) (Sydney: Australian Law Reform Commission, 2000), c. 5, para. 5.150 [ALRC, *Managing Justice*, Report 89].

[200] See *Cummings*, *supra* note 97.

[201] See *e.g.*, Genn, *supra* note 2.

a. Relaxing the boundary between legal information and legal advice for court administrators

[98] The rules could permit relaxation of the boundary between legal information and legal advice. Locating the line between permissible assistance from non-lawyers and assistance that amounts to the practice of law is not a simple matter. The challenge confronts anyone providing assistance to self-represented litigants, whether as court staff or through court- or community-operated legal information centres, and whether in the form of legal information materials, plain-language forms or website sources. Court administrators who meet self-represented litigants at the front counter struggle with this difficulty on a daily basis. The issues has the attention of the Association of Canadian Court Administrators.[202]

[99] Relaxation of this boundary may not be achievable through modification of the rules alone. Implementation could require amendment of the *Legal Profession Act*. Arguably, however, the functions performed by staff working for and under the supervision of the court can be distinguished from the functions reserved to the legal profession under the *Legal Profession Act*. In any event, if proper supervision by qualified lawyers were in place, court staff would be able to render greater assistance without altering the boundary between legal information and advice. Implementation may also require the cooperation of government in providing and training court staff to carry out their broader duties.[203] Legislation could be enacted to protect court administrators from liability.

POSITION OF THE COMMITTEE

[100] Once again, the Steering Committee takes the view that a project on rules reform is not the appropriate context in which to consider adjusting the boundary between legal information and legal advice. However, a number of forms will be developed as part of the Rules Project. In the *Cummings* case,[204] the Court of Appeal of Alberta said that "filling in blanks on standard forms" is not practising law, so the more standard forms that are available, the better the position of the self-represented litigant. The

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[202] This topic was discussed at the Association of Canadian Court Administrator's [ACCA] Conference on "Public Confidence in Fair and Impartial Courts" held in Halifax, Nova Scotia, March 29-31, 2004.

[203] Lowe, *supra* note 31 at 3.

[204] *Supra* note 97 at para. 14.

forms being proposed won't cover everything. For example, the Rules Project is not developing fill in the blanks pleadings. That could perhaps be undertaken in the future by subject matter experts for specified types of actions (*e.g.*, motor vehicle, wrongful dismissal, debt) as it has been for divorce.

b. Expanding the scope of paralegal services

[101] Closely related to relaxation of the boundary between legal information and legal advice for court administrators is the possibility of expanding the permissible scope of services provided by paralegals employed within law firms, or who work independently.[205]

[102] The balance involves providing services to litigants while minimizing the risk of error in the advice given. Workable models for an expanded role without changing the law are available, although their implementation would require the collaboration of bodies external to the courts:[206]

> While the Bar has been resistant to the concept of paralegals providing independent advice and representation, there are models which ensure that paralegals are trained and supervised, so that the public is protected while at the same time effective representation is more broadly available. Paralegals were used extensively in the poverty law practice which developed under the former Legal Services Society Act of British Columbia. These paralegals worked under the supervision of a lawyer in the legal aid poverty clinics which were established throughout BC, and in appropriate cases provided representation before tribunals and courts, negotiated settlements, taught public legal education sessions and supported community programs aimed at assisting the poverty community. The poverty clinics in BC were closed with the recent significant reductions to legal aid funding, although paralegals are still used in the Lawline program which has developed there. These supervised paralegals provide a model which could be adopted in other circumstances, including working under the supervision of lawyers in private practice.

Another option would be to train paralegals for participation in specified types of proceedings, for example, in specified family law matters.

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[205] In September 2004, the Law Society of Upper Canada approved a task force report on governance of paralegals in Ontario: John Jaffey, "LSUC Convocation Favours Paralegals Report by 43-4 Vote" *The Lawyers Weekly* (October 1, 2004) 23. The report proposes the implementation of a post-secondary training program that would allow para-legals to function independently.

[206] Lowe, *supra* note 31 at 3.

POSITION OF THE COMMITTEE

[103] The Steering Committee does not think that a project on rules reform is the appropriate place to deal with expansion of the scope of paralegal services.

4. Unbundling legal services

[104] Another method of getting assistance to self-represented litigants is through the delivery of unbundled (or partial) legal services. Unbundled legal services may be described as follows:[207]

> In cases of unbundling, instead of handling all aspects of a client's file, a lawyer only provides one or more specific services. For example, a lawyer might review a document for a client to make sure that it conforms with proper court procedure or a lawyer might draft a document for a client, leaving the client to file the document and appear on his or her own behalf. A lawyer might also advise on a proposed settlement or coach a person who plans to attend mediation. The important thing is that instead of giving full services the lawyer only assists with some portion of the case. It is a limited retainer.

In short, a litigant may self-represent at one time during a proceeding, be represented by counsel on the record at another, or be assisted by legal counsel but only for a limited purpose.

[105] The courts accept the delivery of partial legal services:[208]

> A person who is representing himself [may] retain counsel to put forward particular aspects of his case to the court. This appearance by counsel does not impose upon counsel the obligations of a solicitor of record.

The Law Society of Alberta "inferentially accepts" unbundled legal services.[209] In balancing the obligation to be thorough with the obligation to be economical, the *Code of Professional Conduct* admonishes lawyers to "carefully assess in each case in which a client desires abbreviated or partial services whether, under the

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[207] Trussler, *supra* note 25 at 561.

[208] *Logan v. Logan* (1993), 15 O.R. (3d) 411 at para. 8(1) (Gen. Div.). However, once a solicitor becomes counsel of record, it is improper for him or her not to attend at all court appearances: "the solicitor of record cannot elect, or accept instructions of a client, not to attend when the proceeding is before the court".

[209] Trussler, *supra* note 25 at 561.

circumstances, it is possible to render those services in a competent manner."[210] In addition, the lawyer "must fully apprise the client of the risks and limitations of the retainer" and confirm the discussions with the client in writing.[211] In its report on *The Future of the Legal Profession: The Challenge of Change* issued in the year 2000, the Canadian Bar Association described the unbundling of legal services as "potentially controversial"[212] It cautioned lawyers about the risks associated with not being fully informed about the case and the possibility of disciplinary consequences for failing to discharge the duty to a client adequately.[213]

[106] This method of providing legal assistance has merits as well as drawbacks. As Justice Trussler points out, these can be viewed from the perspectives of litigants, the court and the legal profession.[214] From a litigant's point of view: legal costs are substantially reduced; some assistance is better than none at all ("[l]egal advice, at any stage of the proceedings, is helpful");[215] and "early legal advice can improve a self-represented litigant's outcome."[216] However, as already noted, self-represented litigants generally do not fare as well as litigants represented by counsel. From the court's point of view: "... it is almost always useful for [a self-represented litigant] to have obtained some assistance whether in the preparation of documents or in advice

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[210] Law Society of Alberta, *Code of Professional Conduct*, looseleaf (Calgary: Law Society of Alberta, 1995), c. 2, commentary G.1(c)(v) [Alberta, *Code of Professional Conduct*].

[211] *Ibid.* Likewise, in Saskatchewan there needs to be a written understanding between the lawyer and the client that makes the arrangement clear. Manitoba and New Brunswick also have concerns about explaining the risks of limited service to the client and the liability issues involved.

[212] CBA, *Future of the Legal Profession*, *supra* note 38. In Ontario, a report is currently being prepared on a completed legal aid pilot project on the unbundling of legal services in relation to family law legal aid certificates. The Administration of Justice Sub-Committee of the Nova Scotia Barristers' Society commissioned Don Clairmont of Pilot Research, to conduct research on unbundled legal services for defendants in criminal proceedings. His report on "The Unrepresented Defendant and the Unbundling of Legal Services" (August 2004) is now in the hands of the Committee.

[213] One suggestion is "to limit liability through legislation or rules, so that lawyers and their insurers are not at risk of claims in these circumstances": Lowe, *supra* note 31 at 4.

[214] The examples that follow are taken from Trussler, *supra* note 25 at 561.

[215] *Ibid.* at 563.

[216] *Ibid.*

on how to make a court application."[217] From the point of view of the legal profession in general, unbundling legal services may create opportunities for work in areas where litigants are representing themselves in increasing numbers.[218] However, it may be difficult to meet the obligations "to thoroughly understand the facts before giving advice"and "to warn the client in writing if the lawyer believes the action being taken by the client is not in the client's best interests."[219] Moreover a lawyer may run an increased "risk of complaints to the law society and claims for negligence because the client later becomes unhappy with the limited nature of the service."[220] From an opposing counsel's point of view, lack of information about the status of representation could be problematic. To take one example, if a solicitor is on the record, a lawyer for another party ought not to talk to the litigant directly whereas if the litigant is acting in person the lawyer on the other side can communicate with the litigant.[221] To take another example, "because the court does not know who has prepared the documents a lawyer might feel that liberties can be taken in the documents that would not be if the lawyer had to appear in court and defend them."[222]

POSITION OF THE COMMITTEE

[107] The delivery of unbundled legal services gives rise to a complex body of issues. In the opinion of the Steering Committee, resolution of these issues is better left to the Law Society of Alberta and the Alberta, *Code of Professional Conduct*.[223]

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[217] *Ibid.* at 561.

[218] *Ibid.* at 562.

[219] *Ibid.*

[220] *Ibid.*

[221] See Alberta, *Code of Professional Conduct*, *supra* note 210, c. 4, rule 6: "If a lawyer is aware that a party is represented by counsel in a particular matter, the lawyer must not communicate with that party in connection with the matter except through the consent of its counsel."

[222] Trussler, *supra* note 25 at 561.

[223] At present the Law Society's Alberta, *Code of Professional Conduct*, *supra* note 210, contains very few direct references to a lawyer's duties with respect to the delivery of partial services. C. 2, commentary G.1(c) states: "In circumstances in which abbreviated or partial services may be rendered competently, the client must be fully apprised of the risks and limitations of the retainer. Discussions with the client in this regard must be confirmed in writing." Other references are more oblique. See *e.g.*, Alberta, *Code of Professional Conduct*, *ibid.*, c. 1, rules 3 and 4; c. 2, rule 2; c. 9, rule 2.

F. Changes in Representation

[108] The rules throughout Canada provide for changes in representation, including notice of the intent to act in person.[224] In Alberta, changes are dealt with in Part 42 on Solicitors. Rule 554 allows a party to file and serve notice of a change of solicitor, a desire to be represented by a solicitor, or a desire or intention to act in person rather than by solicitor.[225] The wording of Rule 554 is permissive with regard to filing, but once filed a notice "shall be served" upon all other parties and, where there is one, the former solicitor.

[109] The unbundling of legal services has implications for the court and other parties who may be confused about representation. To prevent confusion occurring or the court or other parties being misled, it has been suggested that the rules could require that: (1) "any lawyer who prepares or checks documents of a self-represented litigant ... clearly state on the document that the lawyer has done so," and the extent to which the lawyer is acting;[226] (2) a lawyer acting in a limited capacity disclose promptly to the court and other parties in the proceeding the limited nature of the retainer – such disclosure should be noted on the court file;[227] and (3) "the lawyer shall be responsible to file any court order granted or undertake any follow up that is required as a result of a court order."[228]

[110] On the other hand, requiring disclosure to the court where a litigant has received unbundled legal services would run afoul of the Law Society's Alberta, *Code of Professional Conduct* which prohibits a lawyer from disclosing either the identity of a client or the fact of the lawyer's representation."[229] The reason for protecting the

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[224] R. 554; Ontario, Form 15C; Manitoba, Form 15C; Saskatchewan, r. 11(3); British Columbia, Form 11; New Brunswick, r. 17.03(3); Newfoundland. r. 23.04; Nova Scotia, r. 44.04; Prince Edward Island, r. 15.03(3), Form 15C; Northwest Territories, r. 698(3); and Federal, r. 698(3).

[225] R. 554.

[226] Trussler, *supra* note 25 at 561.

[227] This wording is based on the British Columbia Law Society, *Code of Professional Conduct*, looseleaf (Vancouver: Law Society of British Columbia, 1993), c. 10, rule 10.

[228] Trussler, *supra* note 25 at 562.

[229] Alberta, *Code of Professional Conduct*, *supra* note 210, c. 7, rule 2 states "A lawyer must not disclose

(continued...)

confidentiality of communications between a lawyer and his client is tied to the provision of "effective professional service":[230]

> Frank and unreserved communication between lawyer and client encourages people to seek early legal assistance and facilitates the full development of facts, which in turn enables a lawyer to render effective professional service. The maintenance of confidentiality is central to the credibility of the profession and the trust that must be reposed in a legal advisor.

POSITION OF THE COMMITTEE

[111] As stated previously, the Steering Committee does not propose to delve into the issues raised by the delivery of unbundled legal services as part of our consideration of the rules relating to self-represented litigants. Because Part 42 of The Rules focuses on the role of solicitors more than on self-represented litigants, the Steering Committee proposes to deal with Rule 554 within that framework.

[112] We turn now to our exploration of changes that could be made in The Rules generally in order to more effectively meet the challenges posed by self-represented litigants.

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[229] (...continued)
the identity of a client nor the fact of the lawyer's representation."

[230] *Ibid.*, c. 7, commentary G.1.

CHAPTER 3. SELF-REPRESENTED LITIGANTS AND THE APPLICATION OF THE RULES

A. Approach to Discussion

[113] We begin chapter 3 with a general discussion of the extent to which the rules should apply to self-represented litigants. As stated in the introduction to chapter 1, this discussion leads us to conclude that, as a general proposition, the same procedural requirements should apply to all litigants.

[114] Having established this principle, we explore circumstances in which modification may be desirable. To this end, we look at: rules changes that will benefit all litigants (*e.g.*, simplification); rules that are difficult to apply to self-represented litigants (*e.g.*, solicitor's undertakings); rules changes that are specifically designed to respond to self-represented litigant needs; and rules changes that would impose additional or different requirements on self-represented litigants because they do not come to court as trained professionals. The issues we highlight are intended to serve as examples. We would like to have your comments on these issues and to hear from you about other rules which pose problems for self-represented litigants, other litigants or the court.[231]

B. Scope of Application

ISSUE No. 2
To what extent should self-represented litigants be obligated to comply with the rules?

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[231] We note that other approaches to consideration of the scope of the application of the rules to self-represented litigants are possible. For example, in their report on litigants in person the Australian Institute of Judicial Administration, AIJA-LIP, *supra* note 13 at 2, chose to examine litigant needs at four separate stages of the litigation process:

> - the initial stage of commencing proceedings, the impact of which is borne largely by court and tribunal staff;
> - the pre-trial or case management stage;
> - the hearing itself, including suggested guidelines for judicial officers ...; and
> - the appeals or review process.

[115] The rules in most Canadian jurisdictions are silent on the question of the extent to which self-represented litigants should be obligated to comply with the rules. However, Ontario and Manitoba specify that where a party acts in person "anything these rules require or permit a [lawyer] to do shall be done by the party.[232] Holmested and Watson describe this rule simply as an interpretive aid "to remove the need to include in each rule referring to solicitors what is to happen if the party is unrepresented." However, they add, "notwithstanding the literal wording of rule 1.04(3), it is submitted that not everything the Rules require a solicitor to do has to be done by a party if he or she is unrepresented."[233] Seemingly, the Ontario Rule was not intended to express a policy position with regard to application of the rules to self-represented parties.

[116] Federal Rule 122, which is similar, recognizes a discretion in the court to excuse a self-represented party from requirements in the rules. It provides: "Unless the Court orders otherwise, a party not represented by a solicitor ... shall do everything required, and may do anything permitted, to be done by a solicitor." Federal Rule 122 is said to codify "the case law which held that a party not represented by a solicitor had the same rights and obligations as a solicitor under the Rules."[234]

[117] Despite the soundness in principle of applying the rules equally to all parties, in practice the principle is applied with a degree of elasticity. Courts must maintain public confidence in their ability to dispense justice to all who appear before them. Self-represented litigants do not have professional training in legal matters. In the interests of fairness, a judge may need to explain the basic components of substantive law and procedure to a self-represented litigant, or intervene to make sure that the essential details of the case have been presented before making a decision. Technical requirements may have to be relaxed. Adjournments may have to be liberally granted in order to give self-represented litigants time to accomplish necessary tasks. An

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[232] Ontario, r. 1.04(3); Manitoba, r. 1.04(3).

[233] Holmested and Watson, *supra* note 144, vol. 2 at 1-37.

[234] David Sgayias *et al.*, *Federal Court Practice 2002* (Toronto: Carswell, 2002). See also: *Kalevar v. Liberal Party of Canada*, [2001] F.C.J. No. 1721, 2001 FCT 1261 at para. 24 (T.D.): "The Federal Court Rules apply equally to cases where a lay litigant is present or in one where legal counsel has been retained; the Federal Court Rules do not vary because a lay litigant chooses to prosecute his or her claim."

opposing lawyer may bear added responsibility for putting authorities forward or preparing an order for the judge's signature. Other adjustments may be warranted.

POSITION OF THE COMMITTEE

[118] The Steering Committee believes that, as a matter of general principle, the rules should apply equally to all parties. Self-represented litigants must understand that they bear the same responsibilities as professionally-trained lawyers and that they must conduct accordingly. It would be helpful to state this principle expressly in the rules, using the Federal Rule 122 as the model, but adapting it to except situations where the court orders otherwise or the rules otherwise provide. Judges, of course, will continue to have the power to ensure procedural fairness and a just result by exercising the discretion that comes with their inherent jurisdiction to control the conduct of court proceedings.[235]

C. Rules changes that benefit all litigants

ISSUE No. 3
How may self-represented litigants benefit from rules changes that apply to all litigants?

[119] The Canadian Bar Association has pointed out that complexity in the language and substance of court forms and procedures is "[o]ften the biggest hurdle" facing self-represented litigants.[236] In England, Lord Woolf sought "to simplify the rules and procedures of civil litigation so that they will be more easily understood and followed

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[235] See heading E.1 of this chapter for further discussion of the judicial discretion to ensure procedural fairness and a just result. We note as well that r. 558 gives the court considerable flexibility to deal with non-compliance with the rules. It provides:

> Unless the Court so directs non-compliance with the Rules does not render any act or proceeding void, but the act or proceeding may be set aside either wholly or in part as irregular or amended or otherwise dealt with.

R. 558 is dealt with in Alberta Law Reform Institute, *Miscellaneous Issues* (Consultation Memorandum No. 12.14) (Edmonton: Alberta Law Reform Institute, 2004), c. 5.

[236] CBA 1996 Report, *supra* note 55 at 55.

by litigants as well as their advisors."[237] The complexity of the language and process used in the courts were causes of dissatisfaction with the court system for the Albertans who participated in our public consultation focus groups.[238] The Canadian Bar Association has recommended that "every court undertake initiatives to assist [self-represented litigants], including simplifying procedures and forms and using plain language."[239] It points out that the entire civil justice system gains if confusion about procedures is minimized. That is because the time of everyone involved – judges, lawyers, court staff and litigants – will be used more efficiently and costs will be reduced.[240]

[120] Through its objectives, the Rules Project has expressed a commitment to simplifying procedures and making the rules easier to use. If these objectives are met, complex language will be simplified, unclear language revised and repetitive provisions consolidated in order to satisfy Objective #1: maximizing the rules' clarity. The rules will be reorganized into conceptual categories within a coherent whole and restructured to making it easier to locate relevant provisions on any given topic in order to satisfy Objective #2: maximizing the rules' useability. The reforms will include descriptive headings for each subrule, plain language for all forms and rules, and simplified pleadings, forms and financial statements for all cases. The rules will be updated to reflect modern situations, enhance the courts' process of justice delivery and facilitate user needs in order to satisfy Objective # 3: maximizing the rules' effectiveness.

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[237] The Right Honourable H.S. Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: HMSO, 1996) [*Woolf Report*], online: <http://www.dca.gov.uk/civil/final/contents.htm>.

[238] Banister Research & Consulting Inc., *Alberta Rules of Court Focus Group, Edmonton & Calgary Venues, Final Report* (Edmonton: Alberta Law Reform Institute, 2003) at 4.

[239] CBA 1996 Report, *supra* note 55, Recommendation 28. See also Goldschmidt *et al.*, *supra* note 41, 125, which recommended that simplified court forms should be developed.

[240] CBA 1996 Report, *ibid.*

[121] Much of the existing law governing procedures is found in the case law and, therefore, is difficult for self-represented litigants to access. Lord Woolf commented on this fact in England:[241]

> The present rules are complex and daunting in themselves. They are made more impenetrable for the average litigant in person by the accretion of the case law which amplifies many of the rules.

As a matter of policy, the rules could be drafted to include procedural standards that are established by case law, as the Rules Project recommends in some situations.[242]

[122] The Rules Project "Guidelines for Redrafting" reflect the project objectives and the desirability of making procedural information readily accessible:

> • keep the concepts and procedures of the Rules as simple and straightforward as possible, being especially mindful of self-represented parties
>
> • combine procedures to simplify the process ...
>
> • remove unnecessary steps in procedures ...
>
> • incorporate select common law principles, procedures or interpretations ... where doing so makes the Rules easier to understand ...

The implementation of these reforms will benefit not only self-represented litigants but the entire civil justice system.

[123] At the same time, it must be recognized that simplification and accessibility are of limited use to self-represented litigants.[243] Even if the rules are made easier to understand, self-represented litigants will have to look beyond them in order to fully grasp all issues and requirements. They will continue to need expert advice. Civil litigation is a complex process and the availability of simplified rules and forms should not lead self-represented litigants to believe, erroneously, that the pursuit of a cause in court is a simple matter.

[124] In addition to simpler language, some procedures recommended for general use will be particularly helpful in cases involving one or more self-represented litigants.

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[241] Woolf Interim Report, *supra* note 53, c.17, para. 7.

[242] See *e.g.* our proposal, above at 36, regarding legal representation in cases brought by corporations or by persons on behalf of persons under legal disability or serving in a representative capacity.

[243] AIJA-LIP, *supra* note 13 at 16.

For example, the Management of Litigation Committee recommends the introduction of an "early issues conference" with a judge (one of four types of conference now encompassed within the pre-trial conference rule). An "early issues conference" would be in the nature of an *ad hoc* case management conference – its purpose would be to deal with procedural matters, not to resolve the litigation on its merits. It could be initiated by any party or the court on its own motion. It would create an opportunity for the court to provide procedural guidance to the parties, help them clarify the issues involved and suggest that they consider the possibility of alternative dispute resolution.

Position of the Committee

[125] The Steering Committee recognizes the reality of the increasing incidence of self-represented litigants. The Rules Project is attempting to address this reality by creating plain language rules that are understandable to all litigants and processes that are effective and efficient for all litigants.

D. Changes to rules that are difficult to apply to self-represented litigants

ISSUE No. 4

What changes, if any, should be made to rules that are difficult to apply to self-represented litigants?

(a) solicitor's undertakings;
(b) preparing orders;
(c) access to confidential information;
(d) proof of service.

[126] Some procedures are difficult to apply to self-represented litigants. It may be desirable to exclude self-represented litigants from their operation, or modify them as appropriate for application to self-represented litigants. We will discuss examples that have been raised with us.

1. Solicitor's undertakings

[127] Self-represented litigants are not members of the legal profession and therefore not subject to any code of professional ethics or disciplinary action. It is therefore difficult to hold them to undertakings made in the course of litigation. In the

Discovery and Evidence Committee's opinion, the rules should make crystal clear to self-represented litigants the existence of the implied undertaking of confidentiality established by case law that restricts the use, outside of the litigation, of information obtained on discovery.[244] This objective can be achieved by including a general rule that specifies the common law restriction.[245] Including the common law duty to maintain confidentiality in the rules would assist enforcement of the duty by setting up contempt for breach.

2. Preparing orders

[128] In family matters, if not generally, self-represented litigants "often fail to file orders that have been granted" or "refuse to sign their approval on orders given by the court, particularly if they are not favourable to them."[246] Where a lawyer represents one of the parties, a solution is to have the lawyer draft the order. The lawyer may ask the court to "waive the rule that requires the party to agree to the form of the order."[247] However, when this occurs, the order sometimes ends up with an "unfavourable slant with respect to the self-represented party's point of view."[248] Another option is for the court to prepare the order which can then be filed right away. This approach is taken in the Provincial Court of Alberta. If the court prepares the order, neither content nor service will become an issue. A "court-generated orders" pilot project for matters in Family Chambers that involve self-represented litigants is being carried out in the Edmonton Court of Queen's Bench.[249]

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[244] Alberta Law Reform Institute, *Document Discovery and Examinations for Discovery* (Consultation Memorandum No. 12.2) (Edmonton: Alberta Law Reform Institute, 2002) at 30-32.

[245] See *e.g.*, Ontario, r. 30.1.01 on deemed undertaking.

[246] Trussler, *supra* note 25 at 578.

[247] *Ibid.*

[248] *Ibid.*

[249] See description in Alberta Law Reform Institute, *Motions and Orders* (Consultation Memorandum No. 12.10) (Edmonton: Alberta Law Reform Institute, 2004) at 64 [ALRI CM 12.10].

[129] The General Rewrite Committee considered introducing a rule that would require the court to prepare orders.[250] Concerns about workload and resources militated against proposing this change for civil litigation in general. Instead, the Committee proposes that the judge or master should have the discretion (but not an obligation) to direct which party is responsible for preparing the order. If no direction is made, a default rule will take effect.[251] The Committee thinks it "unlikely that a court would fail to give directions when a self-represented litigant is involved."[252] The Steering Committee agrees that, apart from family law, the court should not have an obligation to prepare orders when a self-represented litigant is a party to the proceeding.

3. Access to confidential material

[130] Under the Federal Rules, self-represented litigants do not have access to confidential material.[253] This is one of two specified exceptions from the requirement, in Federal Rule 122, that a self-represented litigant "shall do everything required, and may do anything permitted, to be done by a solicitor." The Alberta rules could make a similar exception. However, what is meant by "confidential" is vague and would need to be elaborated. Does it include all matters subject to publication bans? Quite a few laws ban publication of particular proceedings or certain information in the proceedings, and it would be problematic to try to keep those from a party. Does it mean information that is subject to an implied undertaking as to confidentiality? It would obviously be problematic to keep information obtained on discovery from a self-represented party. Does it refer only to information sealed by court order? In this case, the terms of access are probably best dealt with in the order. Because the discretion whether or not to allow access to confidential material falls within the court's inherent jurisdiction, the Steering Committee takes the view that no equivalent to the Federal Rule is needed.

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[250] *Ibid.* at xiv-xv (summary) and 61-66 (preparing and approving orders).

[251] *Ibid.*

[252] *Ibid.* at 65.

[253] Federal, r. 152(2)(a).

4. Proof of service

[131] The second exception from Federal Rule 122 is that a self-represented litigant cannot prove service by a solicitor's certificate.[254] Rule 16 is on point. It was looked at in Consultation Memorandum 12.1.[255] By its terms, it does not apply to a party. Alberta does not need to make this exception.

POSITION OF THE COMMITTEE

[132] The Steering Committee is of the view that difficulties in applying certain rules to self-represented litigants can be adequately handled by making changes that apply to all litigants.

E. Rules changes that would accommodate self-represented litigants

ISSUE No. 5

What changes, if any, should be made to the rules in order to accommodate self-represented litigants?

(a) role of judges;
(b) role of lawyers;
(c) use of case management;
(d) settlements;
(e) consent orders;
(f) award of costs;
(g) waiver of fees.

[133] In this section, we discuss rules changes that could be made in the interest of accommodating self-represented litigants.

1. Role of judges

[134] Judges control procedure before them as part of their inherent jurisdiction. This constitutionally-held power is a necessary foundation to the principle of judicial independence from the Legislative and Executive branches of government and respect

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[254] Federal, r. 146(1)(b).

[255] Alberta Law Reform Institute, *Commencement of Proceedings in Queen's Bench* (Consultation Memorandum No. 12.1) (Edmonton: Alberta Law Reform Institute, 2002) at 39-40 (Issue No. 28).

for the rule of law. In exercising their power over procedure, judges dealing with self-represented litigants face competing obligations, especially where other parties are represented. The judge must ensure a fair hearing, and may need to assist the self-represented party to achieve this, but must also maintain both impartiality and the appearance of impartiality. The issue of the extent to which judges should assist self-represented litigants or hold them to the same standards as lawyers attracts divergent views. In a court hearing or chambers situation, the continuum of possibility extends from "minimiz[ing] as much as possible judicial interaction with self-represented litigants caused by lack of understanding of the legal process since such interaction may be seen as showing bias or unfairness"[256] to "becoming more interventionist to both assist and control self-represented litigants."[257] The interventionist end of the continuum leads to a shift from an adversarial system toward an inquisitorial system. Indeed, "[t]here have been recent discussions in Canada and other jurisdictions ... about piloting an inquisitorial model for certain types of cases where the incidence of self-represented litigants is high."[258]

[135] To what extent, if any, is a self-represented litigant entitled to special accommodation? The literature identifies three categories of obligations of judges in self-represented litigant cases. The first obligation is "to determine if the litigant wants, needs or is entitled to a lawyer."[259] A self-represented litigant's waiver of

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[256] Coo, Czutrin & Chapnik, *supra* note 93, as summarized in Barrett-Morris, Aujla & Landerkin, *supra* note 22.

[257] Lee Stuesser, "Dealing with the Unrepresented Accused" (Paper presented at the Canadian Association of Provincial Court Judges (CAPCJ) Annual Conference, October 2002) [unpublished], summarized in Barrett-Morris, Aujla & Landerkin, *supra* note 22.

[258] Lowe, *supra* note 31 at 5. Evidence of this trend is available in our courts in general, for example, in the conception of judicial dispute resolution (JDR) favoured by Hugh F. Landerkin & Andrew J. Pirie, "Judges as Mediators: What's the Problem with Judicial Dispute Resolution in Canada?" (2003) 82 Can. Bar Rev. 259. See also Trussler, *supra* note 25 at 572.

[259] Trussler, *supra* note 25 at 566. For a more detailed analysis, she refers readers to Hon. Joanne B. Veit, "Unrepresented and Self-Represented Litigants in Family Law Proceedings: A View from the Bench"(Paper presented at the Legal Education Society of Alberta's Spring Refresher, Banff, April 2001) [unpublished]. Justice Veit discusses the inquiries a court should make when faced with an unrepresented litigant, summarized in Barrett-Morris, Aujla & Landerkin, *supra* note 22:

> 1) Determine if the self-represented litigant is self-represented by choice (or if wants, needs or is entitled to a lawyer).
> 2) Decide if the state should provide legal representation to the accused,

(continued...)

counsel must be fully informed.[260] The second obligation is "to grant appropriate adjournments for the litigant to either obtain the services of a lawyer or to prepare for court."[261] The third obligation is "to conduct the hearing, if the litigant proceeds unrepresented."[262] Where the hearing proceeds, "it is reasonable for the Court to grant the self-represented litigant some degree of latitude in the conduct of the case.[263] In addition, "the Court is obliged to offer procedural explanations and assistance to ensure a fair hearing."[264]

[136] Courts vacillate between the extremes of minimal intervention and an inquisitorial role. Sitting on the minimal intervention side of the mid-point line, the Alberta Court of Appeal recently held that although self-represented litigants are entitled to justice:[265]

> ... they are not entitled to command disproportionate amounts of court resources to remedy their inability or unwillingness to retain counsel. If they seek free lunch, they should not complain of the size of the helpings.

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[259] (...continued)
if the matter is serious enough.
3) Ensure the self-represented litigant explores the availability of legal aid.
4) Consider whether to allow the self-represented litigant representation or assistance by an agent.
5) Grant an adjournment to get a lawyer.

Note that where a person has declined legal representation, there may be ethical issues concerning the degree to which a person is deserving of assistance from court staff and judges: Vince Bruce & Helen Powles, "Litigants in Person" (Discussion Paper) (Sydney: Australian Institute of Judicial Administration, 1993) at 26, cited in AIJA-LIP, *supra* note 13 at 3.

[260] *Murphy v. Gordon* (1986), 77 N.S.R. (2d) 446 at 450 (N.S. Co. Ct.).

[261] Trussler, *supra* note 25 at 568.

[262] *Schubert v. Schubert* (1978), 10 A.R. 305 (S.C.A.D.)

[263] Trussler, *supra* note 25 at 568, citing *Schubert v. Schubert*, *ibid*.

[264] *Ibid*.

[265] *Broda v. Broda* (2001), 286 A.R. 120, 2001 ABCA at para. 4. The self-represented litigant was a lawyer representing himself in a divorce, who was limited to one-half day to cross-examine his wife on an affidavit.

The Court indicated that it did not have the time nor the facilities to instruct a party on how to present a motion. The Federal Court has taken a similar position:[266]

> While the plaintiff has the perfect right to act for herself without the services of a lawyer, it is obvious that the Court has not the time or the facilities and - even more important - the right to conduct law-school or bar-admission courses and give helpful hints to one party or one side ... in litigation. Such activity would utterly destroy the Court's role of independent, even-handed adjudicator.

Two Manitoba cases support the idea that self-represented litigants must comply with the rules so that the rules apply even-handedly to represented and unrepresented litigants.[267]

[137] Other cases indicate that the court will take into account the inexperience of a self-represented party, but only if this does not unfairly disadvantage the represented party. Thus the Newfoundland Supreme Court held that:[268]

> ... the Court may be more inclined to overlook irregularities in procedural details committed by an unrepresented litigant where to do so will not materially affect the other party's ability to know and respond to the claim or defence and otherwise to receive a fair trial.

However, while the court will take into account a self-represented litigant's lack of training or experience, the litigant must also accept that consequences flow from this lack and from the decision to remain self-represented.[269]

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[266] *de Korompay v. Ontario Hydro*, [1990] F.C.J. No. 631 at para. 9 (T.D.). See also *Gilling v. Canada*, [1998] F.C.J. No. 952, at para. 1 (T.D.): "Although the Court is always careful to ensure that other parties do not take advantage of a person representing himself or herself, the individual representing himself must follow the Rules and is not allowed to play the Rules so as to prejudice the other parties."

[267] *Reid v. Manitoba Telephone System* (1997), 127 Man. R. (2d) 273 at para. 17 (Q.B.):

> Litigants or potential litigants proceeding without the benefit of counsel, do so at their own risk, but should not do so to the detriment of other litigants.

Bergen v. Manitoba (1998), 125 Man. R. (2d) 65 at para. 29 (Q.B.):

> The Queen's Bench Rules exist to provide guidance, fairness and consistency for litigants so that litigation can be conducted on as level a playing field as possible. The granting of immunity to one litigant from the application of the rules would result in the denial of rights to other litigants and, ultimately, in the redundancy of the rules altogether.

[268] *White v. True North Springs Ltd.*, [2001] N.A. No. 313 at para. 16 (Nfld. S.C. T.D.), declining an application for an adjournment by a self-represented litigant.

[269] *Leb. v. Smith* (1994), 120 Nfld. & P.E.I.R. 201 at para. 16 (S.C. T.D.), striking out defective pleadings filed by a self-represented litigant. See also *Monahan v. Breen*, [1996] N.A. No. 139 (Nfld. S.C. T.D.) and

(continued...)

[138] The cases provide examples of accommodation of self-represented litigants. The Alberta Court of Queen's Bench noted that while a self-represented party bears the responsibility for choosing not to hire legal counsel, that responsibility and its consequences do not extend to depriving the litigant of the right to prove their claim and to have their day in court.[270] The Nova Scotia County Court has also emphasized the Court's duty to protect the self-represented party:[271]

> Wnen one party is represented by Counsel, and the other party is unrepresented ... it is incumbent upon the Court to make absolutely sure that the unrepresented party is not unduly prejudiced. This may require the Trial Judge to fully explain to the unrepresented party the difficulties of representing himself, and give him an opportunity to obtain counsel, if he should so desire. If the unrepresented party elects to proceed on his own, then the Trial Judge should briefly explain the Rules of evidence, and give the unrepresented party every opportunity to properly present his case, even though this may considerably slow down the work of the Court."

[139] The divergencies in approach may be more apparent than real. That is to say, the statements in the case law may be influenced by factors such as the ability and experience of the particular self-represented litigant, the substantive and procedural complexity of the case, or the past and present conduct of the self-represented litigant in the particular litigation.

[140] A uniform, studied approach to dealing with self-represented litigants could help.[272] Several jurisdictions are developing guidelines to aid the judiciary in dealing with cases involving self-represented litigants and to promote a greater uniformity of approach. In Canada, the Administration of Justice Committee of the Canadian

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[269] (...continued)
Swyers v. Peninsulas Health Care Corp., [2001] N.A. No. 278 at paras. 27-29 (Nfld. S.C. T.D.), both of which applied *Leb. v. Smith.*

[270] *Govenlock v. Govenlock* (2001), 284 A.R. 399, 2001 ABQB 319 at para. 13. Lee J. refused to strike out the pleadings or impose the full costs penalty on a self-represented litigant who did not file an Affidavit of Records in time, but did order $500.00 in costs for the failure.

[271] *Murphy v. Gordon*, *supra* note 260 at para. 26.

[272] ALRC, *Managing Justice*, Report 89, *supra* note 199 at para. 5.157. According to the ALRC:

> All courts should have a Litigants in Person Plan that deals with every stage in the process, from filing through to enforcement ... This is recommended so that systematic attention is given to the issues.

Judicial Council has named a sub-committee on Self-Represented Litigants to develop a self-represented litigant's "good practice binder" for ongoing consultation by the judiciary.[273] In Australia, in the case of *Johnson v Johnson*, the Full Family Court set out the obligations of a trial judge where a self-represented litigant is a party.[274] These guidelines were modified in subsequent case law to make them apply more flexibly.[275] The Australian Institute of Judicial Administration has formulated a list of 18 possible guidelines to follow in trials where one or both of the parties are unrepresented.[276] The American Judicature Society and State Justice Institute has proposed the development of guidelines.[277] However, an American Bar Association committee took the view that no firm parameters should be set as to how far a judge should go to assist a self-represented litigant because of the difficulty of describing by any specific formula the appropriate balance between the responsibility to assist and the need to remain impartial.[278]

[141] The rules could incorporate guidelines for the judiciary to follow in cases involving a self-represented litigant. The Steering Committee considered this possibility but concluded that guidelines are better left to be established by a body, such as the Canadian Judicial Council, that is responsible for setting standards for judicial conduct. The Rules Committee also considered and rejected the possibility of

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[273] See CFCJ CJC Project, *supra* note 30 and accompanying text.

[274] (1997), 22 Fam. L.R. 141 (N.S.W. Sup. Ct.). See also: AIJA-LIP, *supra* note 13. The guidelines consist of:

- outlining the procedures of trial;
- assisting by taking basic information from witnesses;
- explaining the possible effect of requests for changes to normal procedures such as calling witnesses out of turn and the party's right to object;
- informing an unrepresented party of the right to object to inadmissible evidence;
- informing an unrepresented party of right to claim privilege;
- attempting to clarify the substance of submissions of unrepresented parties.

[275] *Re F: Litigants in Person Guidelines* (2002), 27 Fam. L.R. 517 (N.S.W. Sup. Ct.). See also: Denis Farrar, "Litigants in Person–the Story So Far" 15 *Australian Family Lawyer* (2001) 4; and Frank Bates, "Assisting the Unrepresented Litigant in Australian Family Law Proceedings – A Further Refinement" (2002) *Int'l Fam. Law* 70.

[276] AIJA-LIP, *supra* note 13, Appendix 2.

[277] Goldschmidt *et al.*, *supra* note 41, 125.

[278] *Ibid.* at 31, citing American Bar Association, *Commission on Standards of Judicial Administration* (Chicago: American Bar Association, Judicial Administration Division, 1976), s. 2.23 at 45-47.

referring in the rules to the ability of the court to make exceptions or otherwise relax procedural requirements.

2. Role of lawyers

[142] As we stated in chapter 1, lawyers owe duties to their clients and to the court. In the courtroom, a client may misinterpret a counsel's behaviour in fulfilling their duty to the court, for example, to provide all relevant legal authorities on an issue or to bring evidence on an essential matter in the self-represented litigant's case to the court's attention. Counsel who are present in the courtroom although not involved with the case may have a duty to speak up in order to assist the court where a self-represented litigant has missed an important point. Both in and out of court, lawyers on the opposing side of a case must take care to treat self-represented litigants with the same civility, respect and cooperation as opposing counsel.

[143] The duties lawyers owe to self-represented litigants and the court could be included in the rules. However, the Steering Committee takes the view that the task of setting the standards of behaviour expected of lawyers and the duties lawyers owe to the court, clients and self-represented litigants is better left to the Law Society of Alberta and the Alberta, *Code of Professional Conduct*.

3. Use of case management

[144] Case management:[279]

> ... can be a useful tool for cases with [self-represented litigants] that have become highly conflicted. Having one judge hear all motions allows that judge to have a better grasp of the issues between the parties and have some control over the file.

A danger, however, is that a disproportionate amount of the court's time may be taken up because self-represented litigants "often like having their 'own' judge and tend to bring every little problem to the judge for arbitration."[280]

[145] Some reports suggest introducing a case management stream for all cases involving self-represented litigants. Because self-represented litigants generally lack knowledge about their rights and legal procedure, the judge could assist by meeting

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[279] Trussler, *supra* note 25 at 581.

[280] *Ibid.*

with them and managing the process. However, the Management of Litigation Committee rejects this suggestion as an unwarranted use of scarce judicial resources. The suggestion also runs counter to the principle of consistency in the application of the rules to all litigants.

[146] The Steering Committee feels that a meeting with a judge at an early stage of the litigation could be useful in cases involving self-represented litigants. However, we do not see any need to require a case management judge in all such cases. The new rules will require all litigants to set a litigation schedule or to follow the default schedule provided in the rules. If producing a schedule causes difficulties, either party will be able to request case management on a single occasion or ongoing basis. If the litigation schedule is not maintained, the case will go to case management anyway. As well, the new rules will permit any party to request an early issues conference with a judge.[281] Rule 607 provides a check on the overuse of conferences by requiring costs in an interlocutory proceeding to be paid "forthwith" by the unsuccessful party unless the court orders otherwise. These provisions will ensure that meetings with judges will occur when needed.

4. Settlements

[147] England's new Civil Procedure Rules include measures to facilitate offers to settle by self-represented litigants in county court proceedings (but not in the higher courts). They simplify the procedure for paying money into court in support of an offer to settle,[282] or a defence of tender.[283] In our Rules Project, the Costs Committee proposes to make the court process for compromise more user-friendly for all litigants. For example, they propose the inclusion of provisions in the rules that would specify that an offer must indicate "who is making the offer, to whom the offer is being made, whether or not interest is included and to what date, and whether or not costs are included and to what date"[284] and that a form for responding to an offer (a "Notice of

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[281] See above at 60.

[282] United Kingdom, *Civil Procedure Rules*, Part 36 - Offers to Settle & Payments into Court, Practice Direction para. 4.2 [United Kingdom].

[283] United Kingdom, Part 37, Practice Direction para. 2.1A.

[284] Alberta Law Reform Institute, *Costs and Sanctions* (Consultation Memorandum No. 12.17)

(continued...)

Acceptance") would be useful.[285] They also propose that the rules should highlight the importance of an offer of judgment by requiring the inclusion of warnings about the cost consequences of accepting or refusing to accept an offer of compromise within the appropriate time limit, a practice that some lawyers already follow. Self-represented litigants will benefit from the inclusion of this information.

5. Consent orders

[148] Under Rule 329(2), a self-represented defendant who consents to an order or judgment must file an affidavit of execution together with the written consent. The General Rewrite Committee proposes to continue this Rule.[286] In its view, however small the protection, requiring an affidavit does provide a circumstantial guarantee of accuracy with virtually no inconvenience to the self-represented litigant because courthouse clerks will commission the affidavit. Retaining this requirement constitutes an exception from the principle that the rules should apply equally to all litigants. The Steering Committee agrees with the exception.

6. Award of costs

[149] Rule 600(1)(a) creates a list of categories for which one can be reimbursed through costs. The rule states that "any party"can make a claim under any of these categories. The courts have always allowed self-represented litigants, at a minimum, to claim costs for their disbursements,[287] and have not interpreted the rule "as absolutely barring an award of costs to an unrepresented litigant over and above disbursements."[288] Nevertheless, for many years, the courts did not allow self-represented litigants to be compensated for their time and effort. Costs, the courts reasoned, are intended to indemnify the person entitled to them for their litigation

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[284] (...continued)
(Edmonton: Alberta Law Reform Institute, 2005) at 92-93 (Issue No. 32) [ALRI CM 12.17].

[285] *Ibid.* at 93 (Issue No. 33).

[286] ALRI CM 12.10, *supra* note 284 at 71 (Issue No. 71).

[287] *Dechant v. Law Society of Alberta* (2001), 277 A.R. 333, 2001 ABCA 81 at para. 7 [*Dechant*]. For further support that self-represented litigants were always entitled to disbursements, see *Buckland v. Watts*, [1969] 2 All E.R. 985 (C.A.).

[288] *Dechant, ibid.*

expenses. A self-represented litigant has spent no money to hire a legal representative, and therefore has no expense to reimburse.[289]

[150] The situation has changed in recent years. Courts in virtually every jurisdiction in Canada have moved to permit self-represented litigants to receive compensation for their time ("loss of opportunity") in addition to out-of-pocket expenses. At the same time, the courts are taking care not to "over-indemnify" self-represented litigants, encourage litigation or create career litigants. The watershed case is *Skidmore v. Blackmore*.[290] In this case, for the first time in Canada, self-represented litigants were awarded costs beyond disbursements. The British Columbia Court of Appeal found that indemnification as the principle behind costs was flawed because litigants who hire counsel virtually never recover the full amount of the fees that they pay. Instead, the Court turned to the British Columbia Rules in order to conclude that the principles behind costs are to:[291]

> ... partially indemnify the successful litigant, deter frivolous actions and defences, encourage both parties to deliver reasonable offers to settle, and discourage improper or unnecessary steps in the litigation.

These principles leave room to allow self-represented litigants costs for their time.

[151] In Alberta, the principle applied by the courts in several cases is that a self-represented party should not automatically be disentitled to costs.[292] However, it may not be appropriate to award the same level of party and party costs as that which would be awarded to a represented party:[293]

> ... costs under the Rules are still primarily concerned with reimbursement for costs expended and a partial indemnification for legal fees, having regard to value for work. We recognize, however, that costs may include lost opportunity costs of the unrepresented litigant. That said, unrepresented and represented litigants are not in the same

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[289] *Buckland v. Watts*, *supra* note 287; *Kendall v. Hunt* (1979), 16 B.C.L.R. 295 (C.A.).

[290] The watershed case is *Skidmore v. Blackmore* (1995), 122 D.L.R. (4th) 330, [1995] 4 W.W.R. 524 (B.C.C.A.).

[291] *Ibid.* at para. 37.

[292] *Collins v. Collins* (1999), 256 A.R. 311, 1999 ABQB 707; *Shillingford v. Dalbridge Group Inc.* (2000), 268 A.R. 324, 2000 ABQB 28; *Huet v. Lynch* (2001), 277 A.R. 104, 2001 ABCA 37; *Dechant*, *supra* note 287.

[293] *Dechant*, *ibid.* at para. 20.

> position. Schedule C does not provide an automatic basis for determining costs for unrepresented litigants and may also frequently not be appropriate for represented litigants.

[152] Self-represented litigants should not receive a windfall of costs that a represented litigant would not receive. While self-represented litigants expend their own time and effort on the law suit, represented litigants "also sacrifice a considerable amount of their own time and effort for which no compensation is paid" and any "award of costs is merely a partial reimbursement for their lawyer's fees." Using the same costs schedule that is applicable to represented litigants for self-represented litigants "who have no out of pocket expenses for the legal fee portion of the suit, effectively awards fees for their own time and work. In short, self-litigation could become an occupation."[294] The Court's solution to the problem is to "view the matter of costs as discretionary ... and seek an equitable result between the parties while balancing the various policy objectives of costs":[295]

> When awarding costs above disbursements for the unrepresented litigant, the court must look at the particular facts of each case. Was the matter complicated? Was the work performed of good quality? Did the self- representation result in unnecessary delays? Did the litigant take up an unreasonable amount of time of opposing parties or the courts? Did the litigant lose time from work? In general terms, what is the lost opportunity of the unrepresented litigants? What would they have earned if not required to prepare their own case? Did the other side take advantage of the fact that they were facing unrepresented litigants by taking frivolous and unnecessary steps to thwart that litigant? Did the other side refuse to entertain reasonable requests to discuss settlement? What is an appropriate amount for the issues involved? All of the factors set out in r. 601(1) which are relevant in a particular case should be considered when selecting the appropriate costs award.

Under this approach, the award of costs for lost opportunity is just one factor to consider among the "particular facts of each case."[296]

[153] An alternative approach suggested by the Costs Committee would be to introduce a default guideline entitling self-represented litigants to a fixed percentage

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[294] *Ibid.* at para. 17.

[295] *Ibid.* at para. 21.

[296] *Lee v. Anderson Resources Ltd.* (2002), 307 A.R. 303, 2002 ABQB 536 at para. 45, citing *Dechant, ibid.*

of Schedule C costs, say two-thirds, unless otherwise ordered. This approach would have the advantage of maintaining the court's discretion while providing guidance for the majority of cases which are not litigated. In order to maintain the efficacy of the settlement rules, the Costs Committee would not apply the default guideline to formal offers. These offers would operate for or against a self-represent litigant in the usual manner.

Position of the Rules Project Steering Committee

[154] The Steering Committee considered a number of possible approaches to the issue of costs for self-represented litigants, including whether the general rule for self-represented litigants should be no costs other than disbursements, costs in the discretion of the court as set out by the Court of Appeal or costs as a default proportion of the costs that would otherwise be awarded to a represented litigant. The Committee favours staying with court discretion.

7. Waiver of fees

[155] The Costs Committee invites comment on the desirability of including an express provision in the rules permitting the court to waive court fees, but does not take a position.[297] Proof of impecuniosity is one factor the court might consider in making a decision to waive court fees. Although any recommendation would apply generally, self-represented litigants may be expected to benefit from such a provision. As has been seen, poverty is often an obstacle standing in the way of their access to justice.

Position of the Committee

[156] For the most part, the Steering Committee does not believe that the rules should be changed to single out and accommodate self-represented litigants. Changes to the rules that apply to litigants universally will usually be adequate to address the difficulties faced by self-represented litigants. Nevertheless, exceptions are justifiable in some instances, for example, with respect to the requirement that an affidavit of execution accompany a self-represented defendant's consent to an order or judgement.

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[297] ALRI CM 12.17, *supra* note 284 at 120-121 (Issue No. 56).

F. Special procedural requirements

ISSUE No. 6

Should self-represented litigants be required to comply with any special procedures:

(a) mandatory attendance at court information sessions;
(b) participation in an ADR process;
(c) a self-represented litigant track using summary trial process;
(d) special procedures in types of litigation that attract high numbers of self-represented litigants.

[157] The last category to consider is rules changes that would impose additional or different requirements on self-represented litigants because they do not come to court as trained professionals. Four possibilities come to mind.

1. Attendance at court information sessions

[158] Self-represented litigants could be required to attend court information sessions prior to, or immediately after, filing commencement documents. Government cooperation would be required to establish and run such sessions. A precedent for imposing such a requirement is found in Queen's Bench Family Law Practice Note No. 1 requiring mandatory attendance at seminars on parenting after separation in child custody cases. We note, however, that this precedent is subject-based. It does not single out self-represented litigants for special treatment. The Steering Committee does not believe that litigants should be required to attend court information sessions simply because they are representing themselves.

2. Participation in an ADR process

[159] An adversarial approach may not be well-suited to resolving many self-represented litigant issues. In some situations, for example, in family law cases where the parties are going to have an ongoing relationship because of their children, mediation may be the most appropriate way to resolve differences.[298] Before proceeding with litigation, self-represented litigants could be actively encouraged, or required, to make use of alternative dispute resolution services offered either in

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[298] Trussler, *supra* note 25 at 577.

conjunction with or independently of the courts. However, in the Rules Project, the recommendations of the Committee on Early Dispute Resolution address issues relating to the encouragement of alternative dispute resolution and imposition of mandatory requirements.[299] The Steering Committee sees no need to treat self-represented litigants differently from other litigants.

3. A self-represented litigant track using summary trial process

[160] Cases involving self-represented litigants could be directed to a summary trial track. Civil Practice Note 8 of the Court of Queen's Bench of Alberta explains that the summary trial rules "should be used for expeditious adjudication, and be as flexible as possible, limited (with some parameters) only by the imagination of counsel using them." The note goes on to explain that a summary trial is "like any other 'conventional' trial, except the procedures are simplified." On the one hand, the summary trial process allows procedures to be tailored to meet the exigencies of the particular litigation. On the other hand, the summary trial process is very paper intensive and this could be an obstacle for self-represented litigants.[300] On balance, the Steering Committee does not support the idea of creating a summary trial track for self-represented litigants.

4. Specialized procedures for certain types of litigation

[161] Special litigation tracks could be designed for types of cases that involve a large proportion of self-represented litigants. Family law matters are now handled separately from other litigation and self-represented litigants are involved in a high proportion of family law cases. Special procedures could be developed to handle litigation in other areas. We note, however, that the reasons for handling family law separately from other litigation lie in the nature of the subject matter, not the form of representation. The Steering Committee prefers to continue to rely on the procedures that apply to litigation generally, rather than on the development of special tracks based on self- representation.

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[299] Alberta Law Reform Institute, *Promoting Early Resolution of Disputes by Settlement* (Consultation Memorandum No. 12.6) (Edmonton: Alberta Law Reform Institute, 2003).

[300] The summary trial procedure is dealt with in Alberta Law Reform Institute, *Summary Disposition of Actions* (Consultation Memorandum No. 12.12) (Edmonton: Alberta Law Reform Institute, 2004), c. 4.

POSITION OF THE COMMITTEE

[162] As stated at the beginning of chapters 1 and 3 of this Consultation Memorandum, the Steering Committee holds to a general proposition that the same procedural requirements should apply to all litigants. We do not favour the introduction in the rules of provisions that impose additional or different requirements on self-represented litigants simply because they do not come to court as trained professionals.